

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

WESTERN UNION INTERNATIONAL, INC., RCA GLOBAL COMMUNICATIONS, INC., and ITT WORLD COMMUNICATIONS, INC.,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents,

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
TRT TELECOMMUNICATIONS CORPORATION,

Intervenors.

ON PETITIONS FOR REVIEW OF DECISION AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF OF PETITIONERS
WESTERN UNION INTERNATIONAL, INC. AND
RCA GLOBAL COMMUNICATIONS, INC.**

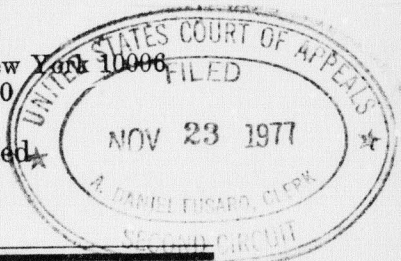
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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC., RCA GLOBAL COMMUNICATIONS, INC., and ITT WORLD COMMUNICATIONS, INC.,

Petitioners,
against

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents,
and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
TRT TELECOMMUNICATIONS CORPORATION,
Intervenors.

ON PETITIONS FOR REVIEW OF DECISION AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONERS WESTERN UNION INTERNATIONAL, INC. AND RCA GLOBAL COMMUNICATIONS, INC.

WESTERN UNION INTERNATIONAL, INC. ("WUI") and RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globecom") two of the three international record carriers (hereinafter "IRCs") who are petitioners in these consolidated dockets, submit this joint brief in support of their Petitions for Re-

view of a Memorandum Opinion and Order ("the Order"), FCC 77-694 (JA 691)¹ released by respondent FEDERAL COMMUNICATIONS COMMISSION ("FCC" or "Commission") on October 25, 1977 (Docket 20452), and proposed tariffs No. 4 and No. 266, revised, of AMERICAN TELEPHONE AND TELEGRAPH COMPANY ("AT&T") and certain of its affiliated Bell System Operating Companies compelled by the Order.

The Order denied requests by petitioners (JA 176, 201, 223) for reconsideration of an earlier Final Decision and Order ("the Decision"), FCC 77-176, 63 F.C.C.2d 761 (1977) (JA 157), released on March 23, 1977, which also is the subject of these Petitions for Review.

The Commission initiated the proceedings leading to the Decision and the Order on its own motion and without any indication that anyone had been aggrieved or had complained. (JA 47, 61) By its Decision and Order, the FCC:

(a) concluded that AT&T's thirty-year-old practice of leasing to the IRCs, pursuant to contract, trunk circuits essential to the conduct of their overseas communications businesses "discriminates" against various specialized common carriers of domestic communications (JA 161) with which the IRCs do not compete (JA 181) and which have not complained about the contracts between AT&T and the IRCs, or the rates charged by AT&T to the IRCs.

(b) by a procedure of prescription and through use of *ex parte* procedures, in violation of both applicable

¹"JA No." refers to page numbers of the Joint Appendix, being filed by petitioners with this brief. Pursuant to Fed.R.App. P. 17(b) and the parties' agreement reflected in a Civil Appeals Scheduling Order entered in these dockets on November 10, 1977, neither the original record nor a certified list of the documents constituting the record before the Commission has been filed. The Joint Appendix contains virtually the entire record made before the Commission and includes every part of it which arguably is of substantive significance.

statutory and regulatory provisions, ordered AT&T to eliminate the "discrimination" (JA 165), to terminate its contracts with the IRCs and to subject the IRCs to tariffs that charge them the substantially higher rates charged to the domestic carriers. (JA 163)

The Commission's Order, denying reconsideration (JA 176, 201, 223), was released on October 25, just two days before the tariffs in question were due to take effect. At the request of a panel² of this Court, the Commission permitted AT&T to withdraw the tariffs and granted AT&T permission to refile them on December 14, 1977, to become effective on one day's notice. Thus, the tariffs are not now in effect, pending an expedited briefing and hearing of petitioners' appeals.

If the Commission's decision stands, business arrangements which have flexibly served the needs of the overseas communications industry for three decades will be displaced; an unrequested, but Commission-prescribed, rate increase of about \$5,000,000 per year will be awarded to AT&T and inflicted upon the IRCs and their customers (JA 194, 267, 446); the IRCs' ability to service their customers will be impaired (JA 407, 452); rate discriminations, which did not previously exist, will be introduced to overseas service (JA 406, 450); and, so far as we can discern or the record shows, no countervailing benefits will be conferred on anyone.

The Decision and Order which have brought the IRCs to this pass are without rational basis in the record. They are the product of inadequate summary procedures that denied the IRCs hearing rights guaranteed by the Communications Act and which were incapable of producing a record adequate for important judgments of the kind the Commission has presumed to make. WUI and RCA Globcom seek relief from the Commission's rulings and,

² Chief Judge Kaufman and Judges Mulligan and Meskill.

on the pages following, demonstrate why they should have it.

Issues Presented for Review

1. Did the Commission commit reversible error by making findings of "likeness" and "discrimination" that were not based on substantial evidence and were arbitrary and capricious?
2. Did the Commission commit reversible error by arbitrarily and incorrectly placing the burden of proof as to "likeness" and "discrimination" upon the IRCs?
3. Did the Commission commit reversible error by failing to conduct an adequate hearing as required by the Communications Act of 1934?
4. Did the Commission unlawfully prescribe the rates AT&T was to charge the IRCs without conducting the hearing and making the findings on an adequate record required by Communications Act § 205?
5. Did the Commission commit reversible error by conducting *ex parte* meetings with AT&T while denying the IRCs' requests for an evidentiary hearing, an oral argument, or even informal meetings of all parties in violation of applicable law and due process of law?
6. Did the Commission commit reversible error by instructing AT&T to discontinue certain services to the IRCs without conducting proceedings required by § 214 of the Communications Act?
7. Did the Commission overlook other defects in the proposed AT&T tariffs which should have led to their rejection?

Statutes Involved

The provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1970), *as amended* (Supp. V. 1975 and Pub.L. No. 94-192 (December 31, 1975)), of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970), *as amended* (Supp. V. 1975 and Pub.L. 94-183 § 2(2) (December 31, 1975)), and of the regulations of the Federal Communications Commission, published in 47 C.F.R., which are materially cited in this brief are reproduced in full text in an appendix at the back of this volume.

Statement of the Case

A. Nature of the Proceedings

The present petitions concern three groups of common carriers of telecommunications; AT&T and its affiliated Bell System Operating Companies (hereinafter collectively "AT&T" unless otherwise specified); the IRCs which provide communications between the continental United States and overseas points; and a group of specialized common carriers using microwave and satellite facilities to compete domestically with AT&T (hereinafter sometimes referred to as "domestic OCCs" or "domestic carriers").³

The Commission's rulings directly affect the services and charges by AT&T to the IRCs for leased trunk bundles of circuits referred to in the industry as "tail circuits". These are used by the IRCs, not to reach individual customers, but to haul traffic between and among their operating centers in five "gateway" cities, and cable stations

³ The FCC generally refers to the specialized common carriers as "SCCs" and to the domestic satellite common carriers as "DSCCs." The SCCs and DSCCs, along with the IRCs, are referred to collectively by the FCC as "Other Common Carriers" or "OCCs."

and international satellite earth stations en route to overseas destinations. For some thirty years AT&T has supplied these facilities to the IRCs pursuant to contracts, a mode specifically contemplated by the Communications Act, *see* 47 U.S.C. § 211 (1975). The most recent of such contracts, which are similar as among the IRCs, were agreed to and filed with the FCC in 1968. (*See* JA 1 for an example.)

The Commission has now held that, because of alleged functional similarity (JA 692), these leased facilities are, under section 202 of the Communications Act, "like" the circuits which AT&T leases to the domestic specialized carriers. (JA 692) AT&T supplies these "entrance" circuits to the domestic carriers pursuant to tariffs. (JA 161) AT&T never has supported these tariffs with the cost-justifications required by the Commission's rules, *see* 47 C.F.R. § 61.38, but the Commission nonetheless accepted them for filing in 1975 because they had been agreed to by AT&T and the domestic carriers, and provided rate reductions from earlier AT&T tariffs which the domestic carriers had challenged. *See* AT&T, 52 F.C.C.2d 727, 734, 737 (1975). (JA 49, 56, 59)

The rates charged by AT&T to the domestic carriers are substantially higher than the contract terms applicable to the IRCs and, if applied to the IRCs, would double their payments to AT&T. (JA 706) The Commission's Decision of March 23, 1977, and in *ex parte* meetings with AT&T following its Decision, directed AT&T to eliminate this "discrimination" (JA 165), and to do so by annulling its contracts with the IRCs and replacing them with tariffs similar to those covering the domestic carriers. (JA 163) AT&T was unable to cost-justify the new tariffs, as required, 47 C.F.R. § 61.38, and the FCC waived compliance. The Commission declined to reconsider its determinations or to reject or suspend the tariffs which AT&T had filed. (Order of October 25, JA 710)

B. Carriers and Facilities Involved

We precede our description of the proceedings at bar with a brief account of the carriers and the facilities they utilize.

1. AT&T

AT&T provides both domestic and overseas communications.

In the domestic sphere, AT&T is the dominant factor in the switched public message telephone system ("MTS"). AT&T (and other telephone operating companies) owns a vast network of circuitry, of which most is devoted to MTS and some is offered to end-users for use as private leased lines, that is, circuits dedicated to a customer's full-time use in communicating between two or more fixed points.

AT&T also offers MTS and private lines to overseas points for, generally, voice-only purposes. The IRCs are the "record" carriers to overseas points. Aside from limited exceptions (*e.g.*, communications to Hawaii), AT&T and the IRCs do not compete with each other.

Overseas communications are provided through submarine cables which AT&T, the IRCs, and various foreign administrations jointly finance, construct, own, and operate,⁴ and through circuits of the INTELSAT system of international communications satellites, which AT&T, the IRCs and foreign administrations also concurrently use. AT&T and the IRCs lease the space segments of these circuits from the Communications Satellite Corporation

⁴ See, *e.g.*, *AT&T*, 35 F.C.C.2d 801, 822-23 (1972), *amended*, 39 F.C.C.2d 865, *amended*, 40 F.C.C.2d 913 (1973). There presently are six transatlantic cables from the United States to Europe, of which the two largest and most recent ("TAT-5" and "TAT-6") depart from Green Hill, Rhode Island, three from the West Coast to Hawaii, two of which continue across the Pacific to the Far East; and several in the Caribbean departing from Florida.

("COMSAT"), the United States member of the International consortium which finances and owns INTELSAT, but AT&T and the IRCs jointly participate in the ownership of the American earth stations which send and receive transmissions to the satellites in space.⁵

2. The IRCs

Petitioners are not licensed to offer communications services between points within the continental United States and, thus, do not compete with the domestic carriers. Their authorizations extend only to communications to and from overseas points and ships at sea. Their licenses limit them to receiving and delivering their traffic within the United States in five gateway cities—New York, San Francisco, Washington, Miami and New Orleans. They offer, between each gateway city and overseas points, telex, telegrams, facsimile, data transmissions, private lines for alternate voice-data traffic and other record-communications services of a sophisticated nature.

The IRCs and AT&T concurrently use and jointly own the cable stations and earth stations which are the United States termini of the cables and international satellites. AT&T trunk lines (the "tail circuits")⁶ connect the cable and earth stations to and among the IRCs' gateway offices, and are leased to the IRCs for their overseas communica-

⁵ The earth stations also are few in number—at Etam, W. Va., and Andover, Me., in the case of services in the Atlantic area and at Brewster Flat, Wash., and Jamesburg, Cal., in the Pacific area. Joint satellite and cable projects conventionally are generally designed and located in light of the needs of the participating carriers, of which the largest is AT&T's. See *AT&T*, 38 F.C.C. 1315 (1965).

⁶ The term "tail circuits" is used in the industry to describe the landline appendages to the intercontinental submarine cable and international communications satellites orbiting in outer space. (JA 176-77)

tions.⁷ The tail circuits were specially constructed for use by AT&T and the IRCs in transmissions to and from the cable and earth stations. See *AT&T*, 38 F.C.C. 1315 (1965). AT&T is the only supplier of the tail circuits. It supplies them under contracts with the IRCs and with various foreign administrations, and charges rates common to all. (JA 187-90) The tail circuits are at issue here, and the issue involves both the IRCs and the foreign administrations which are parties to contracts with AT&T.

The tail circuits are used by AT&T, the IRCs and the foreign administrations. They are not used by the domestic carriers.

AT&T has supplied such tail circuits to the IRCs by contract since shortly after World War II. In 1968, when the IRCs, AT&T and various foreign administrations were engaged in joint planning for the TAT-5 cable from Green Hill, Rhode Island, to Spain and for the tail circuits connecting that cable to the gateway offices, the IRCs applied to the FCC for the right to purchase indefeasible rights of use ("IRUs") in such circuits from AT&T.⁸ AT&T resisted these applications, preferring to retain sole ownership of the tail circuits and to rent them to the IRCs at rates represented to be equivalent to AT&T's cost. (JA 196) With

⁷ The contracts between the IRCs and AT&T do not apply to links between the IRCs' operating centers and individual customers. Such links are provided pursuant to tariff. Thus, the local lines or links, linking telex and private line subscribers to the IRCs' gateway operating centers are governed by Bell tariffs. This case does not concern those tariffs. The issues of this case relate to the transmissions by the IRCs from their gateway operating centers to overseas destinations.

⁸ An IRU is a property form which appears to be unique to the communications industry. For present purposes, it is sufficiently described as a property interest in the nature of ownership in a portion of a jointly used facility. The IRU holders purchase their rights of use in a facility by reference to the capital costs attributable only to that facility. Thus, an IRU represents a substantial economic benefit to the holder and to its customers.

the Commission's knowledge and acquiescence, the contracts in suit emerged in lieu of the IRUs. (JA 196) The industry has operated in harmony for a decade under these contracts. It is these 1968 contracts and their cost structure that the FCC now condemns.

3. The Specialized Domestic Carriers

The specialized domestic carriers, which the Commission now perceives to be the victims of "discrimination", are relatively recent arrivals on the communications scene. Their operations emerged in the '70's. See *Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969).

In a series of decisions, the Commission overruled AT&T's opposition to the market entry of these carriers, and a number of them now exist offering domestic services in competition with AT&T. They use both domestic satellites and microwaves to link their offices in major cities in various parts of the country.⁹ Although the nature of their services is not described at all in the record, it appears that the domestic carriers primarily offer private line channels to government and large commercial users, in competition with the domestic private-line services of AT&T.

Similarly, there is nothing in the present record that indicates what facilities these domestic carriers obtain from AT&T—a matter peculiarly within the knowledge of AT&T and the Commission. The reported cases suggest, however, that what they largely seek (and get) from the telephone carriers are local loops and other short-haul facilities required to link their own trunks and message centers with

⁹ Domestic satellite carriers use earth stations and satellites distinct from those of the INTELSAT system, and generally use their own microwave trunks from their earth stations to their operating centers.

the premises of individual private line subscribers.¹⁰ It is clear that they are not involved with the cable and earth stations jointly owned and operated by the IRCs and AT&T, and their entrance facilities do not connect to any such jointly owned and operated stations.

C. The Regulatory Background

In early decisions dealing with the specialized carriers, the Commission required AT&T to negotiate reasonable contract terms and, pursuant to such contracts, to make available the connecting facilities and services which the new carriers needed to reach their potential customers.¹¹ However, when disputes between AT&T and the specialized carriers arose with frequency and were not readily resolved, the Commission directed AT&T to file tariffs. See *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 438 (1974), *enf'd*, *sub nom. Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir.), *cert. denied sub nom. AT&T v. FCC*, 422 U.S. 1026 (1975) (terrestrial services); *AT&T*, 42 F.C.C.2d 654, 659 (1973) (satellite services).

AT&T and its Bell affiliates filed such tariffs in late 1973, covering facility and service offerings to "Other Common Carriers". One such tariff, filed by the New York Telephone Company, covered the local distribution facilities used by customers to gain access to the operating centers of the specialized carriers in this area. That tariff also covered the facilities by which overseas telex subscribers in New York City gained access to the operating centers of the IRCs. The tariff did *not* apply to the tail circuits connecting the earth stations and cable stations owned by

¹⁰ See *California v. FCC*, No. 75-2060, slip opinion (D.C. Cir. June 20, 1977).

¹¹ See *Specialized Common Carrier Services (First Report and Order)*, 29 F.C.C. 2d 870 (1971); see also *Domestic-Communications Satellite Facilities (Second Report and Order)*, 35 F.C.C. 2d 844, 856 (1972).

the IRCs and AT&T with the gateway operating centers of the IRCs.

A dispute arose whether, under the New York Telephone tariff, certain telegraph-grade facilities theretofore available to the IRCs had to be continued. The IRCs, contending that an unauthorized diminution of service had occurred in violation of Communications Act § 214, 47 U.S.C. § 214 (1970), succeeded in enjoining implementation of the tariff as to them. See *ITT World Communications Inc. v. New York Telephone Co.*, 381 F.Supp. 113 (S.D.N.Y. 1974) (Gurfein, J.).

In July 1974, the Commission opened Docket 20099, *AT&T*, 47 F.C.C.2d 660 (1974), to investigate the adequacy of the AT&T tariff, including the one involved in the *ITT World Communications* case. This precipitated negotiations among AT&T and the affected carriers. In March 1975, they submitted a "Settlement Agreement," which the Commission accepted in disposition of its Docket, *AT&T*, 52 F.C.C.2d 727 (1975). (JA 49)

This agreement, signed by AT&T, the three petitioners and eleven domestic carriers (JA 727, 732), included an Appendix C (52 F.C.C.2d 800) resolving the matters at issue in *ITT World Communications Inc. v. New York Telephone Co.* It also included as Appendices A and B two proposed replacement tariffs covering "facilities for other common carriers" which were intended to resolve the disputes with the domestic carriers. (52 F.C.C.2d 743, 775) For their benefit, the Settlement Agreement provided a substantial discount from AT&T's normal private line rates for circuits of less than 40 miles. (52 F.C.C.2d at 766; JA 531-32) Circuits of this relatively short distance are generally utilized by the domestic carriers.

AT&T did not support its proposed tariffs with any of the justifying economic data required by the FCC rules, see 47 C.F.R. § 61.38. The Commission nevertheless agreed to accept the filings in order to obtain for the public the

rate reductions offered by the tariff to the domestic carriers pursuant to the agreement between AT&T and the domestic carriers . (JA 56, 59)

Although the question of whether the IRCs should obtain tail circuits pursuant to tariffs was raised in Docket 20099, *see AT&T*, 49 F.C.C.2d 729 (1974), nothing in the Settlement Agreement or the Order accepting it had any effect upon the tail circuit contracts. The agreement, in an abundance of caution, made that clear by stating:

Appendix C attached hereto sets forth the basis of agreement between ITT World Communications Inc., RCA Global Communications, Inc., Western Union International, Inc., The Western Union Telegraph Company and the Bell System companies with regard to the offering of wire pair and telegraph grade facilities. It is understood by the parties to this Settlement Agreement that the Bell System companies will revise, as necessary, the OCC facility tariffs to take account of the technical standards, objectives and programs outlined in Appendix C. The parties recognize the unique needs of the International Record Carriers between gateway cities and for entrance channels from Cable heads and earth stations to those carriers' central offices located in metropolitan areas. Facilities for those purposes are now provided pursuant to contract. (*AT&T*, 52 F.C.C.2d at 740)

The FCC raised no objection to the agreement or any part thereof.

D. Initial Proceedings in Docket 20452

On June 6, 1974, the Chief of the Commission's Common Carrier Bureau wrote to AT&T (with copies to the IRCs), noting that the tariffs theretofore filed by AT&T with respect to "other common carriers" did not apply to the trunk facilities which AT&T was making available to the

IRCs. (JA 37) The Chief did not ask for an explanation, but, instead, indicated that he:

expect[ed] AT&T to file, within twenty days of this letter, pursuant to Section 203 of the Communications Act and Part 61 of the Rules, appropriate tariffs upon not less than sixty days' notice, to reflect the offering of facilities [provided pursuant to the contracts]. (JA 38)

AT&T declined, stating in response:

In light of . . . the longstanding mutually satisfactory arrangements between AT&T and each of the IRCs, it does not appear desirable to supersede these contracts by unilaterally initiating the tariff filings contemplated by your letter. (JA 48)

The IRCs noted, as well, the satisfaction of all concerned with the existing arrangements. (JA 39, 42, 46)

Although the FCC indicated in Docket 20099, which ultimately led to the Settlement Agreement described above, that it would investigate the issue raised by the Chief's letter to AT&T, the FCC did nothing on this question until May 7, 1975. It then released a Memorandum Opinion and Order, 52 F.C.C.2d 1014 (1975) (JA 61), initiating its Docket 20452, now before the Court. "It appears to us," the Commission wrote:

that there is no significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers. We therefore believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursuant to contracts. (JA 61)

The Commission said it would investigate:

Whether the Commission should require the international record carriers to obtain entrance (both from cable heads and earth stations) and intercity facilities from AT&T pursuant to tariffs rather than contracts. (JA 62)

The Commission did not explain why "it appear[ed] . . . that there was no significant difference" or why tariffs were preferable to contracts. The Order granted 15 days for comment. It did not request economic data of any kind from AT&T (or anyone else). (JA 62)

The Order further specified that the inquiry would be conducted as "a restricted rule-making proceeding" (JA 62), *i.e.*, a proceeding in which, under the Commission's rules, *ex parte* contacts with the Commission and its staff are forbidden. *See* 47 C.F.R. § 1.1201 *et seq.*

Nothing in the order suggested that the FCC was concerned with possible rate discrimination or with anything other than the differences between the modes of governance, contract or tariff. Accordingly, AT&T and the IRCs responded to the FCC by pointing to their long history of satisfactory operation under the contractual mode. (JA 72, 76, 90, 99, 113) The IRCs also noted the differences, described above, between their facilities and those which AT&T accorded the domestic carriers. They called attention to the absence of any of the vexing controversies which had led the Commission to require AT&T tariff offerings for its domestic competitors. (JA 91, 103, 114) The IRCs also suggested that if the Commission were disposed to annul the contracts, it would be appropriate to permit them to purchase IRUs in the affected circuits, which they had first sought in 1968. (JA 81, 93, 106) The IRCs requested an evidentiary hearing, or other alternative capable of producing an adequate record, if the Commission were disposed to push the matter further. (JA 82) The Commission's procedures make no provision in notice-and-

comment proceedings for discovery. Without such, or another method for eliciting facts, the IRCs were denied the means to create an adequate record. Information as to the facilities utilized by the domestic carriers, and the comparative costs between such and the tail circuits, while available in the files of AT&T, was not accessible to the IRCs.

The Commission received only one comment critical of the contracts, from COMSAT General Corporation. (JA 419) COMSAT General expressed concern that it might be at a disadvantage, *vis a vis* the IRCs, in the operation of the MARISAT system¹² if the IRCs received tail circuits for that service at the rate provided in the 1968 agreements while COMSAT General obtained its circuits at AT&T's tariff rates for domestic carriers. (JA 118) In fact, the IRCs are governed in this service by AT&T domestic tariff rates, and not by the 1968 agreements for overseas facilities. (JA 705) When this was called to the attention of COMSAT General, it dropped its point. No comment from any other party was received.

E. The Commission's Decision of March 23

The Commission released its Decision (JA 157) on March 23. It found "relevant and of decisional significance" COMSAT General's complaint.¹³ (JA 161) It characterized the facilities which AT&T provided the IRCs and the

¹² MARISAT is a satellite system, jointly owned by the petitioning IRCs and COMSAT General, for communicating with ships at sea. It is distinct from the international submarine cables and INTELSAT satellites, all of which are multi-nationally owned. The Navy has leased the bulk of the system's capacity for fleet communications needs. The four joint venturers offer, through the system's remaining facilities, competing services to commercial users. They access the satellites through earth stations in Southbury, Conn., and Santa Paula, Cal. See *generally Communications Satellite Corp.*, 40 F.C.C.2d 496 (1973), 42 F.C.C.2d 533 (1973).

¹³ When the IRCs, in their Petitions for Reconsideration, pointed out the error, the FCC ruled that matter once "decisionally significant," was now "moot." (JA 705)

domestic carriers as "functionally similar" and "essentially identical" and the distinctions between the overseas and domestic services as "irrelevant". (JA 161) It omitted any reasons why the facilities were "identical" or why the differences were "irrelevant".

For the first time the FCC expressed concern for possible rate discrimination and perceived a "potential for prolonged unlawful discrimination" against the domestic carriers. It also noted a "particular concern"

that the charges to the IRCs *may not be* compensatory and the IRCs may be recipients of subsidy from other facilities customers of Bell or from Bell's interstate service offerings. (JA 161) *emphasis added*)

The occasion for this "particular concern" was not explained. Not a word in the record suggests that the contract rates charged to the IRCs by AT&T are insufficient to cover AT&T's costs in providing the service. It was not explained why AT&T, as a monopoly supplier of tail circuits to the IRCs, would wish to give subsidies to them.

The Commission concluded:

[W]e shall order AT&T to eliminate the inequitable and unlawful discriminatory treatment of COMSAT General, DSCCs and SCCs *vis-a-vis* the IRCs. We have previously held that the most desirable means to insure that facilities of the kind in issue herein are provided to all carriers on reasonable and nondiscriminatory terms is by the filing of tariff schedules. (JA 163)

Lest its intent be missed, the Commission dropped a footnote in which it made clear that the tariff AT&T would now have to file would have to be identical, in rates and conditions, as between tail circuits for IRCs and entrance facilities for domestic carriers:

[I]f the rates and conditions vary from those included in tariffs offering similar facilities to COMSAT General, SCCs and DSCCs we expect such differences to be fully justified with Section 61.38 and other data. In the event facilities are offered to the IRCs *on identical terms and conditions* as are given other carriers, we shall waive the Section 61.38 requirement until such time as AT&T files full justification for the various OCC facility offerings. (JA 163 n.8) (emphasis added)

The "identical terms and conditions" applicable to the domestic carriers had never been cost-justified, and AT&T will need "man-years" to develop the data that could show whether or not the terms and conditions are just and reasonable.¹⁴ The terms and conditions of the tariffs are supported only by the agreement of the domestic carriers who received rate reductions therefrom. (See pp. 12-13, *supra*.) Any variation from such terms and conditions in the tariffs would require AT&T to cost-justify that difference, which would require it to justify both its rates to the IRCs and the rates it charges to the domestic carriers. AT&T was left with no real choice. The "identical terms and conditions" which AT&T was expected to file to cover the IRCs would cost the IRCs (and ultimately their customers) a rate increase, unrequested by AT&T, of about \$5,000,000 per year. (JA 194, 263, 446)

F. The *Ex Parte* Dictates to AT&T

The Commission's manifest desire to push the IRCs into

¹⁴ AT&T previously had indicated that it would supply economic justification for its various OCC tariffs by December 1, 1978. (JA 720) The Commission announced in its Order that it was asking AT&T to accelerate that date. (JA 720) AT&T has since informed the Commission that "man-years" will be involved, and it is doubtful that it will be able to satisfy the December 1978 deadline. See 43 *Telecommunications Report* No. 45, pp. 10-11 (Nov. 14, 1977). (JA 737)

the domestic "pen" created a dilemma for AT&T's operating personnel.

The Commission had "adopted" its Decision (and informally made it available to the parties) on March 8. (JA 157) By March 24 it was apparent to AT&T that the Decision's goal of "identity" between the IRCs and the domestic carriers was beyond sensible implementation. There then ensued four critical *ex parte* meetings between the Common Carrier Bureau and AT&T, extending through May 20, in which AT&T was instructed by the Bureau what it had to do to file an acceptable tariff. The FCC rules prohibit such meetings in "restricted proceedings." 47 C.F.R. § 1.1201 *et seq.* Docket 20452 was established as such a proceeding in the Designation Order. (JA 62)

The only record of these meetings is a letter (JA 336) which the Acting Deputy Chief of the Bureau wrote to WUI on June 24 in response to a Freedom of Information Act request (JA 330), *see* 5 U.S.C. § 552 (1970, Supp. V. 1975). The letter attempts to reconstruct from the Bureau's recollection the content of these undocumented sessions.

AT&T, it appears, had concluded that its tariff for domestic carriers could not also be applied to the IRCs, notwithstanding the direction of the FCC that there be identical tariffs. (JA 163) Among others, the following reasons were given:

(a) Unspecified "technical and operating arrangements" differed. (JA 718) It seems that the domestic tariffs do not offer services conforming to the international operating standards established by CCITT (a French acronym for the applicable intergovernmental body). Communications from the cable and earth stations through the IRCs' tail circuits do conform to these international standards;

(b) The facilities and services for the "White House

'Hotline' " (JA 339)—a group of circuits from Washington to Moscow, using different transmission paths, which are designed to provide, at all times, a capability for almost instantaneous communication between the President and the ranking officials of the Soviet government;

(c) The contingency plans developed by AT&T, the IRCs and foreign carriers to reroute overseas traffic in the event of a temporary "outage" on a cable or at an earth station (JA 339);

(d) The joint overseas television transmission service supplied by AT&T and the IRCs (JA 338);

(e) Access to a Florida-Cuba cable circuit serving foreign diplomats in Havana (JA 338);

(f) Joint arrangements of AT&T and the IRCs for testing the circuitry of the Defense Department's service "AUTOVON" network, connecting United States military bases throughout the world (JA 338); and

(g) A 48-Kilohertz facility supplied by one of the IRCs to the National Aeronautics and Space Administration used by it, through the satellite earth stations at Etam, W. Va., for tracking and monitoring space satellites. (JA 339)

The FCC referred to matters (b) through (g) as "quirks". (JA 339) AT&T was informed that, without prejudice to its promised cost-justification waiver, it could exclude the "quirks" from its tariff, leaving them in "limbo", neither under contract nor under tariff. No explanation was given for these exceptions. (JA 339) AT&T was further advised, in order to obtain formal sanction for its action, to file a Petition for Clarification, and it obtained the assistance of the FCC staff in drafting the appropriate waiver requests for the tariffs it would ultimately file. (JA 339) Promptly following the

meetings, AT&T filed a separate tariff for the tail circuits to the cable and earth stations conforming to CCITT standards (JA 293), notwithstanding the ruling in the March 23 Decision that there be identity of conditions as well as rates. (JA 163 n.8)

AT&T also advised the FCC's staff that there were differences in cost between the tail circuits and the circuits relating to the domestic carriers. (JA 338) AT&T was not allowed to convey such information because "none of the AT&T employees present was an attorney." (JA 338) AT&T was also told that this point could be raised by a Petition for Reconsideration. (JA 338) AT&T did not file such a petition and, because of the FCC's waiver of cost-justifications, the differences in cost between tail circuits and entrance facilities to domestic carriers was not made a matter of record.

The absence of the IRCs from these four meetings prevented them from adding their expertise to resolve the problems discussed in their absence and assured that there would not be an adequate record for an appellate court to review.

G. AT&T's Tariff Filings

On May 26, 1977, AT&T filed tariffs in "response to the Federal Communications Commission's Final Decision and Order in Docket 20452. . . ." (JA 293) AT&T also wrote to the IRCs cancelling their various 1968 leasing agreements as of the proposed effective date of the tariff filings. (JA 320)

The tariffs as filed specified an effective date of August 25 (JA 293), but this date has been several times adjourned, most recently at the request of a panel of this Court (*see* p. 3). The effective date is now December 14, AT&T's filing was not accompanied by the justifying economic data required by 47 C.F.R. § 61.38.

The rates specified in the tariffs represented quantum jumps over those specified in the leasing agreements they were to replace. They expose each of the IRCs to overall rate increases of more than 100%, aggregating for the overseas carriers, and ultimately their customers, some \$5,000,000 per year. (JA 194, 267, 446)

The tariff pattern which AT&T seeks to impose to conform to the Commission's demand for "equivalence" with the domestic carriers will, if implemented, have particularly harsh consequences on the West Coast. The IRCs' San Francisco gateways, the transpacific cable stations at San Luis Obispo and Point Arena and an INTELSAT earth station at Jamesburg all are located in the State of California, and those tail circuits to the San Francisco operating centers will be tariffed by Pacific Telephone and Telegraph Company ("Pacific"), and incorporated by reference into the AT&T tariffs at issue here, contrary to FCC rules. 47 C.F.R. §61.74. Those referenced rates, in turn, are based on the rates of Pacific's intrastate tariff for private line services, and are not subject to FCC jurisdiction. Since intrastate long distance rates in California are unusually high, the rates of any tariff which "follows" a California intrastate schedule will also be high. (JA 354)

Pursuant to AT&T's Settlement Agreement with the domestic carriers in Docket 20099 (*see* pp. 12-13 *supra*) Pacific's tariff for other carriers offers substantial discounts from the intrastate rate pattern for circuits of 40 miles or less. (*AT&T*, 52 F.C.C.2d at 766) This exception, is, by reason of distance, unavailable for the IRCs' tail circuits.¹⁵ Thus they face rate increases in California of up

¹⁵ The international cable and earth stations were, and are, sited to take account of the needs of AT&T, as well as the IRCs. The domestic carriers locate their facilities for their sole convenience. AT&T may insist that cable and satellite stations be sited at points

(footnote continued on following page)

to 400% and there still will not be identity of rates in California, only this time the IRCs will be paying more. (JA 354)

The new tariffs also deprive the IRCs of service options they previously had under contract. For example:

(1) Under the AT&T tariffs there is, for any circuit, a minimum charge of a month's rentals; under the contracts, circuits could have been taken for a minimum charge of 1/10 of a month's rental in accordance with normal international practices throughout the world. (JA 358-59) The short-term rentals are important to the news media for covering international news and sporting events—for example, the visit of President Sadat to Israel. (JA 358)

(2) The IRCs no longer have access, under the tariffs, to "groups" and "super groups"—bundles of circuits that can be aggregated for simultaneous, coordinated use. (JA 532) Such aggregation is vital for data transmission.

(3) Quality control procedures and guarantees, which the IRCs received with their circuits under the contracts, are not similarly available under the tariffs (JA 349), thus requiring other arrangements if the transmission standards appropriate to intercontinental communications are to be retained. (JA 349) It is not clear that alternative arrangements can feasibly be obtained.

H. The IRCs' Unavailing Challenges

Each of the petitioners duly filed, in accordance with the Commission's Rules, *see* 47 C.F.R. § 1.106, a Petition for Reconsideration (JA 176, 201, 223) of the Decision of

(footnote continued from preceding page)

distant from the IRCs' offices in the five gateway cities, thereby increasing tail circuit costs. One of the important reasons for using contract, rather than tariffs, to govern the relationship between AT&T and the IRCs is to take account of such problems of location.

March 23, and for Rejection and Suspension of AT&T's tariffs. (JA 342, 365, 392, 400, 415, 442, 456)

In its Order of October 25 (JA 691), the Commission rejected these Petitions in their entirety. (JA 722) At the same time it granted AT&T's Petition for Clarification (JA 722), thus excluding from the tariffs the "quirks" which the FCC's dogma of "identity" could not plausibly accommodate. The FCC offered to the IRCs that the propriety of the AT&T tariffs would be examined, but at a later date. (JA 720)¹⁶ The IRCs were warned, however, that they would not be allowed to show technological and cost differences between the tail circuits and the entrance circuits for domestic carriers in those later proceedings. (JA 722 n.33)

As for the Order, the Commission denied that its barebones notice-and-comment procedures were inadequate. It ruled that no more was required, for the IRCs had "failed to rebut the presumption of unlawful discrimination that led to initiation of Docket No. 20452." (JA 700)

The Commission rejected the argument that the facilities offered the domestic carriers and the IRCs by AT&T were "unlike". It ruled that they were "like" because the "same communications function" was served.¹⁷ (JA 701)

¹⁶ See fn. 14, p. 18, *supra*.

¹⁷ The problem of this argument is that it proves too much. Every circuit serves the same "function"—it carries communications. AT&T's OCC tariffs provide, as the Commission's earlier decisions required, a broad menu of facilities theoretically open to all. But a tariff is an offering, not a bill of sale. The fact remains that the IRCs and the domestics sup from different dishes—the IRCs requiring trunk bundles between a handful of fixed points (gateways, cable heads, and earth stations) which they all have served for years and are likely to serve for years to come, while the domestics seek, on an *ad hoc* basis, individual circuits, generally short haul, to particular customers. The Commission documents the supposed "equivalence" of AT&T's two classes of carrier customers only by naked, repetitive assertion.

The Commission thought it of "no significance" that the domestic carriers had not complained of the "discrimination" which AT&T allegedly had visited on them. By their silence, they were "merely abiding by the Docket No. 20099 Settlement Agreement. . . ."¹⁸ (JA 692) As for COMSAT General's mistaken claim of disadvantage with respect to MARISAT, a matter treated in the Decision as of "decisional significance" (JA 161), the FCC now stated that its "particular concern" was "moot". (JA 705)

The Commission refused to acknowledge that its Decision had directed AT&T to terminate its contracts with the IRCs and to file tariffs. AT&T had been free, said the Commission, to do as it pleased so long as it eliminated the "discrimination" found. (JA 695)

With respect to the tariffs, the Commission thought its waiver of the cost-justification requirements of its rules was in the "public interest". (JA 717) The IRCs could look forward to an unspecified time when the Commission would address the reasonableness of AT&T's pooled rates as to all carriers, domestic and international. (JA 720)

The Commission found no impropriety in the Common Carrier Bureau's *ex parte* conferences with AT&T from March through May 1977. (JA 721) The tariffs which eventuated from those sessions had not yet been filed, it said, and thus no proceeding was pending. (JA 721) The FCC overlooked that its rules bar *ex parte* meetings until the time for Petitions for Reconsideration and Petitions for Review to the Court of Appeals run, and such time plainly had not run. 47 C.F.R. § 1.1207. In any case, the FCC added, the IRCs had not been prejudiced. (JA 721) The FCC neglected to add, in all this, that the IRCs had all along asked for evidentiary hearings, oral argument or,

¹⁸ The basis for this insight is not explained. The Designation Order in Docket No. 20452 had invited comments from anyone. (JA 62)

simply, meetings of all parties. (JA 39, 82, 177, 190-93, 557), and that the *ex parte* meetings, aside from their impropriety, would not have been necessary had the requests of the IRCs been granted.

POINT I

The FCC Ruled That a Discrimination Existed and Ordered It Eliminated Upon an Assumption of Likeness of Services Not Based on Substantial Evidence and Invoking Procedures That Were Arbitrary and Unjust and in Violation of Petitioners' Substantive and Procedural Rights.

The Decision and Order required that AT&T file a tariff for the IRCs' tail circuits containing rates and practices identical to those that exist for the entrance facilities of the domestic carriers. AT&T could not comply because of factual dissimilarities in practices. Notwithstanding, AT&T raised its rates for tail circuits to the level of domestic OCC rates, pursuant to FCC staff guidance and instructions conveyed in *ex parte* meetings.

The FCC has no power under section 202(a) of the Communications Act to order a carrier to modify its rates and services unless it has found them to be discriminatory as a matter of fact. Similarly, the FCC's power to prescribe a rate (47 U.S.C. § 205) depends on its finding as a fact that the rate is unlawful because it is unreasonable, unjustly discriminatory or unduly preferential. *E.g.*, *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975); *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973); *AT&T v. FCC*, 449 F.2d 439, 451 and n.12 (2d Cir. 1971); *see also Morgan v. United States*, 298 U.S. 468 (1936) and *ICC v. Louisville and Nashville Railroad*, 227 U.S. 88 (1913) (interpreting statutes identical to the Communications Act § 205(a)).

We show below that the FCC did not find that an unlawful discrimination in fact existed and that the FCC

seemed so to concede by characterizing its action as preventing a "potential" for discrimination. (JA 161, 705) The FCC misread the law regarding discrimination, deprived the IRCs of their right to an evidentiary hearing and shifted the burden to the IRCs to prove that an historic rate and contract structure was not unlawful.

A. The Applicable Standards

Section 202(a) of the Communications Act prohibits "unjust discriminations" and "undue preferences." We learn the difference between these two concepts from the cases construing the same terms in sections 2 and 3 of the Interstate Commerce Act, the sources of section 202(a). See S. Rep. 781, 73d Cong., 2d Sess., p. 4 (1934). The purpose of section 2 is to insure equality of rates for equal services, *L. T. Barringer & Co. v. United States*, 319 U.S. 1, 9 (1943). A discrimination under that section is a difference in rates for equal services. Such a discrimination exists where ratepayers located in the same place are charged different rates for services performed over the same routes. *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (1949)¹; *A. Lindberg & Sons, Inc. v. United States*, 408 F. Supp. 1032 (W.D. Mich. 1976). As the leading commentator on the Interstate Commerce Act has explained: "The administration of section 2 of the Act, as has been seen, leads to a *precise equality of charges* on the traffic over identical routes. . . ." III-B, I. L. SHARFMAN, *THE INTERSTATE COMMERCE ACT* 530 (1936) (emphasis added).

Rate differentials between shippers located in different places and using different routes to arrive at different locations are not covered by section 2. As Sharfman explains:

¹ "[T]he purpose of this section [Int. Comm. Act § 2] is to enforce equality between shippers of like commodities over the same line or haul for the same distance and between the same points." (*Id.* at 584)

When commodities differ, and the relationship of their rates is subject to determination, the pertinent factors approach such a state of incommensurability as to render any undebatable adjustment impossible; and the same is true as between movements of the same commodity over different routes or between different points of origin and destination. But when shipments are entirely alike in these respects, or when persons travel between identical termini, the simple rule of equality of treatment seems obviously applicable. (*Id.* at 359)

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1) (1970), the section prohibiting undue preferences, covers those situations.

Unlike the finding of an unjust discrimination, which requires *elimination* of the price differential, when an undue preference is found the price differential is adjusted so that it is no longer offensive. Thus, Sharfman explains that an undue preference may require increase, decrease or elimination of the rate differential. III-B, SHARFMAN, *supra* at 557.

It is well established that an undue preference exists only when a price differential gives an unwarranted competitive advantage to one ratepayer over another. *A. Lindberg & Son, Inc. v. United States*, 408 F. Supp. at 1037. Nothing in the record below indicated that the IRCs and the domestic carriers compete and, in fact, they do not. Thus, the concept of a preference had no application in the present case.

Rate differences are not *per se* unlawful. If a rate is itself reasonable, the fact that it differs from other rates is of no consequence, unless it is shown that the differential is discriminatory between similarly situated ratepayers who obtain like services, or that it gives an undue preference to one competitor over another. In either case,

the issue is one of fact, not law, and both discrimination and preference must be found on the record or not at all. See, e.g., *Associated Press v. FCC*, 452 F.2d 1290, 1300-01 (D.C. Cir. 1971):

Not every variation in prices charged customers for a particular feature of the carrier's service supports a claim of unlawful discrimination. Since rate classifications, no less than other classifications, may be justified by differences between the classes, the mere existence of a disparity between particular rates does not establish a statutory violation. Much less can an allegation of discrimination safely be predicated upon a piecemeal comparison of classified tariff charges.

And equal rates do not necessarily disprove a discrimination, for if services are unlike, rates should not be the same. III-B, SHARFMAN, *supra* at 557.

Thus, the issue whether or not a discrimination or preference exists is a question of fact requiring proof and full evaluation of the relevant circumstances. Had there been an adversarial hearing, the lack of competition between the IRCs and the domestic carrier would have been shown, disproving the possibility of a preference. Furthermore, since the IRCs and domestic carriers use physically different and independent circuits and communicate between different origins and destinations, there could not have been a discrimination. A hearing would have shown the gaps in the FCC's factfinding and reasoning.

B. The Requirements of a Hearing

Disputes as to the existence of "discrimination" and "preference" are disputes about facts which can properly be resolved only by evidentiary hearings. See *United States v. ICC*, 352 U.S. 158, 176 (1956); *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943); *Texas & P. Ry. Co. v. ICC*, 162 U.S. 197, 219 (1896). As the Su-

preme Court wrote in its landmark construction of the Interstate Commerce Act in *Texas & P. Ry. Co. v. ICC*:

The very terms of the statute, that charges must be "reasonable", that discrimination must not be "unjust", and that preference or advantage to any particular person, firm, corporation or locality must not be "undue" or "unreasonable", necessarily imply that strict uniformity is not to be enforced, but that *all circumstances and conditions* which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, *should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.*

* * *

The third section² forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, *such questions are questions not of law, but of fact.* The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable 162 U.S. 198, 219-20 (1896) (emphasis added)

² Now § 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1) (1970).

The FCC in this case attempted to avoid its obligation to hold the required hearing by designating Docket 20542 as a rule-making proceeding using a barebones notice-and-comment procedure. It could not, we submit, properly do so. See Communications Act § 205, 47 U.S.C. § 205 (1970), and cases cited, p. 26, *supra*. Even in a rule-making proceeding, the presence of significant issues of disputed fact precludes a simple notice-and-comment procedure. Cf. JA 698 with *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *Chicago v. FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *Northern California Power Agency v. Morton*, 396 F. Supp. 1187 (D.D.C. 1975). The issues of fact must be explored and evaluated on a full record.

The IRCs, as we show, raised precise issues of fact which could be resolved only by information about the business of AT&T and of the domestic carriers which was beyond the control of the IRCs. Without appropriate hearing procedures, and the opportunity for discovery incident to such a hearing, a proper record could not be developed to give substantial evidentiary support to the conclusion of "discrimination" upon which the Commission's Decision and Order fundamentally rest.

C. It Was Error to Shift the Burden to the IRCs to Disprove Discrimination, Especially Because They Lacked Access to Material Facts Under the Control of AT&T and the Domestic Carriers

The FCC initiated this proceeding by stating its assumption that the IRC tail circuits and the facilities used by the domestic carriers were "similar." (JA 61) The ground asserted by the FCC for this assumption was that there was "functional similarity" between the two sets of services that were offered, that is, both connected "earth stations, microwave terminals, or cableheads" to operating

offices.³ (JA 61) With that, the FCC ruled, citing no authority, that the burden shifted to the carriers to prove that cost, technical service or other differences rendered the services "unlike."

This shifting of the burden was contrary to authority and, in the circumstances at hand, grossly unfair and in violation of due process of law.

It is established law that the burden of proof is upon the complaining party who seeks to set aside a rate for being unreasonable, unjustly discriminatory or unduly preferential. *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 812-13 (1973); *A. Lindberg & Sons, Inc. v. United States*, 408 F. Supp. 1032 (W.D. Mich. 1976); *Koppers Co. v. United States*, 166 F. Supp. 96, 100, 102 (W.D. Pa. 1958); *Central of Georgia Railroad v. United States*, 379 F. Supp. 976, 978-79 (D.D.C. 1974), *aff'd sub nom. United States Clay Producers Traffic Ass'n v. Central of Georgia Railroad*, 421 U.S. 957 (1975).

In a discrimination case, as the court explained in *L. T. Barringer & Co. v. United States*, 319 U.S. 1, 6, 9 (1943), the complainant must prove sufficient facts to justify elimination of a rate differential by showing that the "circumstances and conditions of the total transportation services rendered by the carrier" are the same. A difference in rates cannot be held illegal "unless it is shown that it is not justified by the cost of the respective services." *United States v. Illinois Cent. R. Co.*, 263 U.S. 515, 524 (1924).

Clearly, without further proof, a showing that two services are "functionally similar" (assuming for the moment that they are) says nothing about the costs of performing those services. The question is, who has the burden to

³ This factual assertion was misleading. The domestic carriers have never connected to "cableheads", and each class of carrier has its own "earth stations" and "microwave terminals", none of which are used by the other.

show those costs and whether they are the same or different. The IRCs cannot carry that burden, for they do not have access to AT&T's costs. Yet, the FCC ruled that they had this burden, and the FCC then assured that they could not possibly satisfy that burden by denying the IRCs' request for an evidentiary hearing and the discovery that would be available following the convening of such a hearing, *see* 47 C.F.R. §§ 1.311-25.

The FCC itself has recognized that "functional similarity" or even identity of services does not preclude the possibility that cost differences might exist in the provision of two services. *DDS*, 62 F.C.C.2d 774, 796-97 (1977) (potential exists for differences in cost where facilities are "functionally similar" but might be technologically different). If like rates were prescribed notwithstanding such differences of cost, the FCC might itself be creating discrimination. III-B, *SHARFMAN*, *supra* at p. 557 (1936). *See also Wight v. United States*, 167 U.S. 512 (1897); *United States v. Pennsylvania R. Co.*, 266 U.S. 191 (1924) (absorption of cost of service incident to charging equal rate, held, discrimination); *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 656 (1933) (a discrimination is produced by charging equal rates for unequal service and is prohibited by statute (49 U.S.C. § 3(1)) (dissenting opinion of Mr. Justice Stone, agreeing with the majority on this point).

The FCC recognized the possibility of cost differences in the present case. In footnote 8 of the March 23 Decision, the FCC gave AT&T the option to file lower rates for tail circuits if it could cost-justify the differences. (JA 163) And in the *ex parte* meetings, a member of the FCC staff "indicated that a cost difference, if justified, could render a discrimination reasonable." (JA 338) However, the FCC did not permit the differences to be made a matter of record, for an effort by AT&T to disclose such at an *ex parte* meeting was stopped (JA 338), and the denial of an evidentiary hearing prevented the IRCs from producing

comparative costs. The FCC's Order on Reconsideration attempted to gloss over these deficiencies by shifting the burden to the IRCs to prove justification. There is no authority to support such a shift of burden. In light of the inability of the IRCs to have access to relevant information, and the waiver of the section 61.38 requirement for AT&T to cost-justify its new tariffs (discussed in Point II, *infra*), such a shift of the burden of proof denied the IRCs their basic rights.

In sum, the FCC could not properly find "likeness" by assuming "functional similarity." In order to prove likeness, the record would have had to develop the nature of the trunk lines connecting the cable and earth stations jointly owned by the IRCs and AT&T with the gateway city offices of the IRCs. Comparisons should have been made between these and the entrance facilities utilized by the domestic carriers. The methods by which the AT&T and IRC tail circuits are multiplexed, and the manner by which communications from customers are then switched to the appropriate operating offices should have been shown, with comparisons to whatever situations might be comparable with respect to the domestic carriers. Comparative costs should have been developed. Comparative traffic densities and capacities should have been investigated. The history of investment and ownership should have been discussed. Problems relating to joint ownership of cables with AT&T and with foreign administrations should have been taken into account.

There is not a scintilla of evidence in the record on any of these matters. Instead of taking evidence, the FCC made assumptions. Instead of applying expertise, it made facile observations. This is not a sufficient basis for finding likeness. *Associated Press v. FCC*, 452 F.2d 1290 at 1301 (D.C. Cir. 1971).

D. *Ex Parte* Meetings Were Unlawfully Substituted for Open Meetings

Striking differences between the IRCs and the domestic carriers are suggested, however, in the terse disclosures made by the FCC of the *ex parte* meetings between it and AT&T.

The day following the decision, AT&T sought a meeting to explain to the FCC that different services were involved with respect to the "tail circuits" and that such differences prevented AT&T from filing the identical tariff that the March 23 Decision required. The FCC's Freedom of Information Act response characterized the substance of the meeting as presenting "a few unique factual situations," "the complexity" of which "required a larger, more detailed meeting." (JA 336)

The "larger, more detailed meeting" occurred a week later, on March 31. It seems, as the FCC characterized it, that AT&T had "3-5 problems . . . in implementing the Commission's Decision." (JA 337) There was a blackboard illustration of the tail circuits at issue here, which is not part of the record and which was not subject to review and comment by the IRCs. (JA 338)

A number of important concessions were made by the FCC staff, which, again, did not make up part of the record. A member of the staff stated that if facilities were provided to the IRCs "with no request for such facilities from other carriers, the Decision did not apply," that is to say, there could be no "likeness" and no "discrimination." (JA 338) The staff member went on to state that "a cost difference," if justified, could render a discrimination reasonable, that is to say, cost differences would have contradicted the finding of discrimination.

The discussion at the March 31 meeting makes reference to the following striking admission with regard to a statement by AT&T that there were differences in cost as

between the tail circuits and the entrance facilities relating to the domestic carriers:

AT&T once started to discuss the difference in cost in building IRC entrance facilities vis-a-vis OCC "entrance facilities".

The discussion was abruptly stopped

After being told that none of the AT&T employees present was an attorney, the Bureau Staff stated that such a discussion should not occur. (JA 338)

Such information would not have been glossed over had the discussion occurred in the form of testimony at a hearing or if the IRCs had been present at the meeting.

After two hours of meeting, it appeared, as the FCC characterized it, that AT&T still had "unresolved problems." (JA 338) Accordingly, a third meeting was held, on April 20, 1977. (JA 338-39) AT&T advised that it would file tariffs "to comply with the FCC's decision "in cases where there was existing or potential unlawful discrimination." (JA 338) There was no explanation of what was meant by "potential" discrimination. The ambiguity of the term, as the FCC characterized it, was just the sort of term that cross-examination should explore. However, the meeting was not part of the record.

The FCC's response went on to refer to "several quirks" concerning the tail circuits. (JA 339) A black-board depiction occurred explaining the use of "super-

⁴ Although the FCC staff knew on April 20 that AT&T intended to file tariffs raising the IRCs' rates and modifying certain, but not all, of the existing differences between the tail circuits and the OCC entrance facilities, the FCC's Order criticized the IRCs at three different places for "*speculating* at the time they filed their reconsideration petitions [on April 22 and 25] both that AT&T would file tariffs and about the content of such tariffs." (JA 707; see also 696, 697 n. 7) (emphasis added)

groups" in tail circuits. (JA 339) The discussion went on to make reference to "service reliability parameters," and compared these to aspects of the entrance facilities applicable to domestic carriers. (JA 339) Additional "quirks", said to be four or five in number, were then discussed, including the "White House Hotline" to the Soviet Union, a telegraph grade circuit to Cuba, facilities to restore service in case of failures in submarine cables or INTELSAT facilities, a "48 KHZ facility" and overseas television service. It appears that some notes were taken with regard to several of the "quirks" but, the FCC stated, the notes were "discarded" shortly after the meeting. (JA 339)

The last of the four meetings occurred on May 18, 1977. (JA 339) At this meeting, AT&T presented a draft of the request it would shortly file asking the FCC to waive various of its rules regarding the cost-justifications that are required to support the reasonableness of tariffs. It appears that the FCC was taking pains to assure that nothing would be presented on the record that might diminish the rulings that had been made in the March 23rd Decision and which, it is clear from the *ex parte* meetings, were impossible of rational implementation.

These *ex parte* meetings were objected to by WUI in a Petition for Reconsideration. The FCC, without discussion of the significance of the "quirks" or other troublesome differences that first came to its attention in the *ex parte* meetings, dismissed without comment the possibility of differences. The FCC also brushed aside any questions that the *ex parte* meetings were improper. We turn to both these points, and to the *ex parte* meetings first.

E. The *Ex Parte* Meetings Violated the FCC's Own Rules and Deprived the IRCs of Due Process

In its Designation Order of May 7, 1975, the Commis-

sion denominated this matter as a "restricted rule-making proceeding" pursuant to Part 1, Subpart H, of the Commission's rules, in which its decision would be "based on matter submitted for or incorporated into the record." (JA 62)

Under these regulations, a "restricted rule-making proceeding" remains such as long as the matter still is subject to reconsideration by the Commission or to review by the courts. (47 C.F.R. § 1.1207) Decision-making Commission personnel, including for this purpose the Chief of the Common Carrier Bureau and his Staff, are prohibited from entertaining *ex parte* presentations in such a proceeding. (47 C.F.R. § 1.1225) Further, if such a presentation is made, a written statement of the presentation must be forwarded to the Commission's Executive Director for placement in a public file. (47 C.F.R. § 1.1243)

The Commission disregarded these rules: first, by meeting with AT&T on four occasions from March through May 1977 to discuss implementation of the Commission's Decision of March 23; second, by keeping no adequate record of those meetings; and third, by not disclosing these meetings until confronted with a Freedom of Information request. (JA 330) The topics discussed included the cost and other differences between the IRCs' tail circuits and the facilities which AT&T offered domestic carriers, which an FCC staff member recognized to be an appropriate subject for a Petition for Reconsideration. (JA 338) The effect of these sessions was an off-the-record amendment of the Decision so as to exempt from its absolute requirement of identical tariffs those features which rendered that requirement potentially unsound and which impeached its premise of "likeness" between the services afforded the IRCs and the domestic carriers by AT&T.

In *Home Box Office, Inc. v. FCC*, No. 75-1280, slip opinion, (D.C. Cir. March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977), the Court of Appeals condemned FCC

ex parte contacts in a *non-restricted* rule-making procedure, stating:

[I]f the Commission relied on these apparently more candid private discussions in framing the final . . . rules, then the elaborate public discussion in these dockets has been reduced to a sham.

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable. (*Id.*, slip opinion at 89)

The court in *Home Box Office* ordered the FCC to hold an evidentiary hearing to determine the nature and extent of all *ex parte* contracts with the Commission and its Staff, because the secrecy inherent in such contracts is inconsistent with:

fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits which undergirds all of our administrative law. (*Id.*, slip opinion at 94)

The vice inherent in *ex parte* meetings is the absence of the illumination likely to be afforded by adversarial discussion in a public hearing confrontation. The Commission's short, reconstructed disclosure of its meetings with AT&T made only after WUI's Freedom of Information Act request does not obviate this danger. As the court also said in *Home Box Office*:

Even if the Commission had disclosed to this court the substance of what was said to it *ex parte*, it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among parties. (*Id.*, slip opinion at 91)

See also Moss v. CAB, 430 F.2d 891, 900 (D.C. Cir. 1970).

The *ex parte* meetings in this case also enabled the FCC to avoid its responsibility of developing a full factual record in open proceedings and of inquiring into and considering all relevant facts. *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); see also *Rhode Island Consumers Council v. FPC*, 504 F. 2d 203, 210 (D.C. Cir. 1974); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

AT&T disclosed at the *ex parte* meetings and sought guidance with respect to matters which should have been developed before the Commission rushed to its initial judgment of "discrimination" and undoubtedly would have been had the FCC been willing to tolerate anything beyond the barest notice-and-comment proceeding. The IRC were denied the opportunity to show at these secret meetings that the so-called "quirks" were, in fact, commonplace in international communications. The FCC attempted by the *ex parte* meetings to bury matters which, had they been considered on a evidentiary record, would inevitably have undermined its "findings" that AT&T's service offerings to the IRCs and domestic carriers are "like" and that AT&T's rates to the IRCs are "discriminatory."

F. The FCC's Reasons for Dismissing the Evidence of Record as to Dissimilarity Are Without Merit

The IRCs argued to the FCC, as we urge here, that there are many dissimilarities in the facilities AT&T affords the IRCs and the domestic carriers. Without discussing the nature of these dissimilarities or making any comparative evaluations, the Commission brushed them aside. It simply insisted that the "functional similarity" in the facilities offered by AT&T to the two classes of carriers outweighed all other factors. These included the absence of competition between the two classes of carriers, technical differences between the AT&T facilities used by

the two classes, differences in the forms of service offered the public by the two classes of carriers, AT&T's fiduciary relationship to the IRCs with respect to their co-ownership of cable facilities and earth stations, and the potential right of the IRCs to acquire IRUs in the tail circuits. As authority for this summary approach, the Commission cited only two of its own decisions, *DDS* and *Hi-Lo*. (JA 701)

Properly read, these decisions, and others which the Commission ignored, demonstrate that "functional similarity" is not an adequate basis for a finding of "discrimination".

One of the cases disregarded by the Commission is *Bell System Tariff Offerings*, 46 F.C.C.2d 413 (1974), *enfd sub nom. Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), which involved a fact situation virtually identical to the present one. There AT&T unilaterally attempted to apply its domestic carrier tariff to Western Union Telegraph Company ("WU") which, like the IRCs obtains certain facilities from AT&T under contract. WU resisted AT&T's effort, and the FCC held that it would have to conduct a full factual investigation to:

ascertain and compare the nature of the facilities and services provided to Western Union and the other carriers, whether circumstances exist which justify different charges to different carriers, and consider all other facts and circumstances submitted by the parties . . .
46 FCC 2d at 435.

The Commission's rulings in the *Bell System* case also reflect an attitude about rate differentials quite different from the one on display here. The FCC observed in *Bell System* that it had no way of knowing whether AT&T's higher domestic tariff rates or the lower contract rates available to WU were reasonable. Thus, it concluded, it

could not impose the higher rates on WU without conducting a full investigation of the kind it declined to consider making in this case.

The FCC's reliance on *DDS*, 62 F.C.C. 2d 774 (1977), also is unjustified. There the FCC held that the "*potential*" for cost differences implicit in technological differences provided a sufficient justification for rate differences between two services even though they were "functionally similar," *Id.* at 797. The Commission did say that technological differences could not by themselves outweigh functional similarity if the two services were perceived by customers as being similar and interchangeable (a situation which scarcely exists here). But it is clear from the FCC's discussion that a functional similarity is the beginning, not the end, of inquiry.

AT&T (Hi-Lo), 55 F.C.C. 2d 224 (1975), *on reconsideration*, 58 F.C.C. 2d 362 (1976), also fails to carry the weight assigned to it by the Commission in this case. There AT&T had sought to undercut the prices of the domestic microwave and satellite communications carriers by dropping its rates for services to high-density areas ("HiD"). AT&T's competitors in high-density areas, and press users in low-density areas, complained that the low-density ("LoD") rates cross-subsidized the HiD rates, resulting in unlawful discrimination. In the course of presenting this issue, the FCC's trial counsel established that LoD service was essentially the same as another service, available to the press at lower rates, known as "Telpak end link services." The FCC ordered AT&T to end the rate discrimination between LoD and Telpak end-links (a directive which, in that case, implied a likely increase of some kind in the low Telpak rates theretofore enjoyed by the press).

The press users, before being exposed to a possible increase in their Telpak rates, had received a full evidentiary hearing in an adversary proceeding, as contrasted with the *ex parte* proceedings in the case at bar. The FCC trial

staff had carried the burden of providing likeness of service and the FCC had found that the evidence proved there were *no* cost, functional or technical differences between LoD and Telpak end link service.⁵

The rulings of the FCC which have emerged in the instant case were not factually supported. And, in the absence of an adequate record, they could not be rationally based. *Cf. RCA Global Communications, Inc. v. FCC*, 559 F.2d Adv. Sh. 881 (2d Cir. 1977)

POINT II

The Commission Has Prescribed AT&T's Rates Without the Hearings, Findings, or Record Support Required by Law

The Commission's Decision of March 23 concluded, without a proper hearing or substantial evidentiary support, that AT&T's contract rates to the IRCs were "unlawfully discriminatory" when compared to the tariff rates available to the specialized domestic carriers. The Commission then compounded its error by, for all practical purposes, directing AT&T to cure the ostensible discrimination in a particular way, *i.e.*, by imposing tariffs upon the IRCs identical to those applicable to the domestic carriers. It did so although AT&T had never filed the cost-justifications required by 47 C.F.R. § 61.38 for such tariffs and could not file such cost-justifications. (JA 737)

Thus, the Commission prescribed the rates AT&T was

⁵ The FCC, moreover, ordered a further full evidentiary hearing to consider whether the press is entitled to preferential rates. It placed the burden of proof on persons having possession of the relevant data. *Preferential Rates for Press Use of Domestic Private Line Service*, 56 F.C.C.2d 796 (1975). Here, on the other hand, there was no evidentiary hearing. And, because important evidence was outside the control of the IRCs, there was no opportunity for them to present the information that could have made an adequate record.

to charge the IRCs even though (a) the Agency had not afforded the "full opportunity for hearing" guaranteed by the Communications Act § 205, 47 U.S.C. § 205 (1970), when rates are to be prescribed, and (b), it had not found, and had made no record which would permit a finding, that the prescribed rates were, in the words of section 205, "just and reasonable." These deficiencies, we submit, are a second, independent reason for reversal.

A. AT&T Was Given No Choice But to File the Tariffs in Issue

An agency may eliminate a perceived "discrimination" in two ways. It may itself prescribe a rate which is just and reasonable (*see* Communications Act § 205, 47 U.S.C. § 205 (1970)), or it may give latitude to a carrier to cure a discrimination. *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1972); *see New York v. United States*, 331 U.S. 284, 340-41 (1947); *Baer Bros. Mercantile Co. v. Denver & Rio Grande Railroad*, 233 U.S. 479, 485-88 (1914).

If the agency elects to prescribe, it may do so only if it has specifically determined that the existing rates are unlawful and the prescribed rates are just and reasonable. *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975); *AT&T v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973); *AT&T v. FCC*, 449 F.2d 439, 451, n.12 (2d Cir. 1971); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 387 (1932).

Such determination must be based on a record made "after full opportunity for hearing," Communications Act § 205, 47 U.S.C. § 205 (1970), and appropriate findings which have substantial evidentiary support, 5 U.S.C. § 706 (1970).

Alternatively, an agency may give the carrier the option to abate the discrimination, which the carrier then can accomplish by raising one rate, lowering the other, or

by altering both. An agency may not, however, lawfully use its power of rate suspension, or otherwise so apply its rules, as to dictate to the carrier the tariff which it must file. For in that case, the result is an agency-made rate. *AT&T v. FCC*, 457 F.2d 865, 874 (2d Cir. 1973); *S.C.R.A.P. v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds, sub. nom. Aberdeen & Rockfish Railroad v. S.C.R.A.P.*, 422 U.S. 289 (1975); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). As the Supreme Court wrote in *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933), "The situation must be such that the carrier . . . , if given an option, has an actual alternative."

There is no basis in this record that could support the prescription of rates by the FCC. The record is altogether devoid of economic data. The Commission allowed no hearing procedures appropriate either to elicit or to evaluate such data. Indeed, the Commission conceded in its Order on Reconsideration of October 25 that it has no idea of what would constitute just and reasonable rates for AT&T's offerings to either the domestic carriers or to the IRCs. That is a matter, it said, which it might investigate at some later time. (JA 720)

Thus, on this record, the Commission was unable to prescribe. It was required to leave to AT&T the choice of remedy for the "discrimination" which the Agency had claimed to find.

In theory, AT&T had four options:

1. Lower the domestic rates to the IRCs' level;
2. Raise the IRCs' rates to the domestic level;
3. Change the rates for both the IRCs and the domestic carriers to equalize them; or
4. Maintain different rate levels for the IRCs and domestic OCCs.

In actuality, AT&T had only one option: raise the IRCs' rates to the domestic level. The FCC announced it would waive its cost-justification rule 47 C.F.R. § 61.38, if AT&T did so:

In the event facilities are offered to the IRCs on the identical terms and conditions as are given other carriers, we shall waive the Section 61.38 requirement until such time as AT&T files full justification for the various OCC facility offerings. (JA 163, n.8)

AT&T has reiterated that it cannot file such cost justification until December 1978 at the earliest.¹ (JA 737)

Absent such cost-justification, AT&T could not "vary" the IRCs charges "from those included in tariffs" applicable to the OCCs. (JA 163, n.8) Thus faced with an FCC mandate to end the alleged "unlawful discrimination", AT&T took the only route available to it—raise the IRCs rates to the OCC level.

The Commission in its Decision of March 23, paid no more than lip service to AT&T's freedom of choice. It made clear that "if the rates and conditions [offered to the IRCs

¹The requirements of section 61.38 are substantial. Indeed, AT&T has stated that in the present case it would take "man-years" to compile the data needed to meet those requirements. (JA 737) The rule requires each carrier filing a tariff to submit explanations of the new tariff and economic data supporting it, such as three-year cost projections, estimates of effects on traffic and revenue, and underlying working papers and statistical studies. The FCC stated, when it promulgated this rule, that it regarded this information "as basic to the formulation of essential regulatory judgments we must make with respect to the lawfulness under the Communications Act of new or revised rates tendered by common carriers." *Amendment of Part 61 of the Commission's Rules*, 25 F.C.C. 2d 957, 965 (1970). If AT&T had unilaterally decided to bring the IRC tail circuit rates under the OCC tariffs, section 61.38 material would have been required: "In the case of a tariff filing proposing a rate to follow existing rate patterns, the carrier should have cost support to demonstrate that it fits within the existing pattern." (*Id.* at 966)

by AT&T] vary from those included in tariffs offering similar facilities to COMSAT General, SCCs and DSCCs, we expect such differences to be fully justified with Section 61.38 and other data." If those rates did not vary, the Commission would waive the requirements of section 61.38. (JA 163, n.8)

The several *ex parte* meetings between AT&T and the Common Carrier Bureau confirm the significance of this "incentive." Both FCC and AT&T well knew that AT&T could not provide cost-justification data for its domestic carrier tariffs until late 1978 at the earliest. One of the motivations for the meetings was AT&T's desire to find out what it had to do to preserve the waiver promised in the Decision even though that Decision's announced goal of "identity" between the IRCs and the domestic carriers could not, in major respects, be satisfied.

Thus, AT&T had no real alternative but to conform its rates and practices for tail circuits to its rates and practices for domestic carriers. (See discussion of facts, pp. 16-21, *supra*.)

Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), makes clear that an Agency cannot avoid "prescription" merely by creating an appearance of voluntary action by a carrier. A reviewing court cannot effectively perform its function if agency-made rates are imposed upon the ratepayers under the guise of carrier-made rates. In *Moss*, the Court of Appeals held:

In the absence of a compelling justification for the Board's admitted practice of making rates by use of its suspension power, we cannot help but conclude that the Board is only seeking to avoid the strict requirements of the rate-making portion of the statute and the resulting more stringent judicial review. (*Id.* at 900)

In *Moss*, the court explained that "it would be very diffi-

cult indeed to apply this limited standard of review [applicable to carrier-made rates] to a record made in large part behind closed doors" during *ex parte* meetings with the carriers. (*Id.*)

In *Moss*, the CAB had concluded, after a number of *ex parte* meetings with the carriers from which ratepayers were excluded, that an increase in air fares was needed. The Board suspended all rate increases previously filed by the major air carriers, simultaneously issued a detailed formula for computing fares and announced that it would consider fares consistent with its formula to be *prima facie* reasonable, but would require cost-justification before any non-complying rate would be permitted to become effective. Under the pressure exerted by the CAB, the carriers reluctantly withdrew their proposed tariffs and filed new ones in accordance with the Board's formula.

On review, the court found that the practical effect of the CAB's action was a prescription of rates, because, under the circumstances, the CAB had given the carriers no practical alternative except to comply with its "suggestion." The court held the tariffs invalid because they had been prescribed without the statutorily mandated notice and hearing.

The FCC has done here, we submit, precisely what the court in *Moss* held unlawful. In the Decision, AT&T was ordered to file tariffs eliminating the "discrimination" within thirty days. However, AT&T was given no discretion for, the FCC stated in footnote 8, that, if AT&T filed tariff schedules offering facilities to the IRCs "on the identical terms and conditions" as those already tariffed to the domestic carriers, then the normal requirement for cost-justification of proposed tariff rates would be waived. Since AT&T could not cost-justify its rates, either the existing rates to the domestic carriers or any new rate, and since AT&T was not permitted to continue "discriminatory" rates, AT&T was without choice.

As *Moss* and its progeny teach, it is the impact of the agency's action, not its verbal form, which determines if there has been a prescription subject to the requirements of the Communications Act, section 205. *AT&T v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973); *AT&T v. FCC*, 449 F.2d 439, 451 n.12 (2d Cir. 1971). Under the rule of *Moss v. CAB*, AT&T's rates were, we submit, prescribed in an unlawful manner.

B. The Rationale Given by the FCC for Causing an Increase in Tail Circuit Rates Is Specious and Arbitrary

Quite apart from the standards of section 205, the Commission's requirement that AT&T "equalize" rates by raising those for the IRCs to the levels of the tariffs for the domestic carriers is without rational basis. The Commission's reasoning was as follows: (a) unreasonably low rates to IRCs might cross-subsidize the unreasonably high rates charged to domestic carriers for entrance facilities; (b) AT&T competes with the domestic carriers, but not with the IRCs; and (c) the cross-subsidization thus handicaps the domestic carriers. (JA 161, 704) This reasoning is defective at every step.

1. There were no findings, and no evidence upon which a finding could be made, that the tail circuit rates to the IRCs were unreasonably high, low or, indeed, other than reasonable.

2. Classically, companies in a monopoly position tend to overcharge. There was no motive for AT&T, which was in a monopoly position with respect to the IRCs, to undercharge the IRCs.

3. The FCC decision does exactly nothing for the domestic carriers, for it does not change the rates which they pay (and which they agreed to pay in Docket No. 20099). If AT&T's rates to them are unreasonably high, they re-

main so. The only difference is that the IRCs (and their consumers) will now also be burdened by such unreasonably high rates.

4. The additional \$5,000,000 per year burden which the Commission has inflicted upon the IRCs and their customers does not help the domestic carriers either. They do not compete with the IRCs.

In sum, the FCC decision makes no economic sense, not for the domestic carriers who are supported to be the beneficiaries of the FCC's Decision, and certainly not for the IRCs and their customers who will be seriously harmed by the Decision.

C. The FCC Decision Arbitrarily Prevents the IRCs From Receiving the Benefits of Lower Costs of "Tail Circuits" in Relation to "Entrance" Circuits

The FCC Decision and Order also have the effect of forbidding the IRCs from ever challenging the propriety of the tail circuit rates as applied to them. (JA 722 n.33) While the Commission's Decision and Order appears to contemplate the eventual submission by AT&T of cost justifications for its tariff rates, these justifications are now required to be for composite rates to all carriers, and not for the distinct service category represented by the IRCs. This result, too, is reversible error.

Assuming, *arguendo*, that the FCC was correct in finding functional similarity between the tail circuits and the domestic OCC facilities, it does not follow that there are no cost differences between the facilities, and, therefore, a rate differential between the two classes of carriers may not be unjustly discriminatory. See *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 578, 588 (1949). The FCC itself acknowledged this familiar regulatory principle in footnote 8 of its Decision (JA 163) when it extended to

AT&T the theoretical option of filing tail circuit rates for the IRCs which differed from the domestic tariff rates if AT&T also filed cost-justification materials pursuant to 47 C.F.R. § 61.38.

Similarly, during the *ex parte* meetings between representatives of AT&T and the FCC on March 31, 1977, a member of the FCC staff stated that a cost difference could render a differential reasonable and, as a result, not unlawfully discriminatory. (JA 338) AT&T told the FCC, in the *ex parte* meetings, that there indeed were cost differences. (JA 338) The FCC's response was to bar such discussions, ostensibly because none of the "AT&T employees present was an attorney." (JA 338) After its refusal to hear about such cost differences, the FCC at the next *ex parte* meeting asked if, and was told by AT&T that, the domestic carrier rates would be applied to the IRCs as well. (JA 338-39) The FCC made it unfeasible for AT&T to set a rate for the IRCs that was in any way different from the entrance rates for the domestic carriers, and thereby the FCC forbade a different rate.

The FCC then went on to compound error. Notwithstanding the statements in the March 23 Decision (JA 161) and the *ex parte* meetings (JA 338) that different costs could justify different rates, the FCC's Order barred the IRCs from showing at some future time that tail circuit costs were less than "entrance" costs to domestic carriers:

Of course, our basic Docket No. 20452 findings that the contract facilities provided to the IRCs are "like" those tariff facilities provided to the DSCCs and SCCs, and that AT&T and the IRCs have not justified the rate preference given the IRCs are not subject to further challenge in such investigation. . . . (JA 722 n.33)

Although a composite rate constructed for both the IRCs and domestic carriers may theoretically be subject to challenge in some future proceeding, the IRCs are foreclosed

from ever questioning the differences between their tail circuits and the OCCs entrance facilities. Different rates for the two classes of carriers, based on differences in AT&T's costs of serving them, is outside the scope of permissible inquiry. Thus, the FCC seeks to immunize its error from challenge.

The FCC denied that it prescribed the IRC tail circuit rates. It claims, in addition to the excuse of voluntariness discussed above, that it did not prescribe the IRCs' tail circuit rates because the reasonableness of AT&T's rates still are subject to investigation. But, under the ground rules it had established for that investigation, any challenge to the reasonableness of the IRC "tail" tariff, and any effort to demonstrate cost differential relative to that tariff, are foreclosed. The insulation of a rate from future challenge is the legal essence of rate prescription. *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932).

This, we submit, is error, for the reasonableness of the domestic OCC tariff and the reasonableness of the IRC tail circuit tariff are two different issues. Absent a specific finding by the FCC, on the record, that there is some illegality in AT&T's refusal, heretofore, to pool entrance and tail circuit costs, the FCC cannot prescribe such pooling of costs. The IRCs cannot lawfully be barred from whatever benefits flow from differences in AT&T's costs, nor be made to share those benefits with the domestic OCCs. See, e.g., *United States v. Illinois Cent. R. Co.*, 263 U.S. 515, 524 (1924): ("[T]he difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."). The rule is clear that to charge like rates where costs are unequal can be as much a discrimination as charging unlike rates where costs are equal. III-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 557 (1936); *Private Line Cases*, 34 F.C.C. 217 (1963); see also cases cited at p. 33, *supra*.

The FCC's decision exposes the IRCs to precisely the "cross-subsidy" that is so strongly condemned in its Decision and pretends to have cured. If the lower costs of tail circuits are pooled with the higher costs of entrance facilities, as the FCC order mandates, the greater efficiency and higher traffic density of the AT&T tail circuit operations will accrue, not to the IRCs and their customers, but to the domestic carriers. There has been no showing of the public interest that justifies such a result.

As we have shown in Point I, the FCC did not adequately find that the particular differential obtaining between the IRCs' contract rate and the domestic carriers' tariff rates was unjustly discriminatory. Nor did it suggest at what point a differential would be unjustly discriminatory or why. For all that the FCC knew, the present differential, or a greater or lesser differential, could be cost-justified.

Yet, despite these possibilities, which the FCC's findings have foreclosed, the FCC has made it impossible for AT&T to file a tariff with any rate differential. The Commission told AT&T at the March 31 *ex parte* meeting that AT&T need not take such cost differences as existed into account in its tariff filings.

POINT III

The Commission Committed Other Reversible Errors

The Commission's brusque treatment, in its October 25 Order, of significant issues raised by the IRCs led it to commit numerous errors of law which, independent of the reasons discussed in the preceding points, require vacating the Decision and Order and the tariffs filed by AT&T "in response" thereto. (JA 293) Several of the more egregious examples are discussed in the paragraphs following.

A. Failure to Require Section 214 Certificate

Under their contracts with AT&T, the IRCs are able to secure various services from AT&T which are unavailable under the AT&T tariffs.¹ These include temporary circuits for short-term use at less than monthly rates, "through group technologies," and "C2S" conditioning of circuits. (JA 349, 406-07) The result of the FCC's effort to trim and tailor its tail circuit offering to make it "like" the domestic carrier tariff will be the discontinuance of these services, adversely affecting the quality and diversity of the overseas communications which the IRCs can offer the public. As the FCC itself had conceded, AT&T has provided no explanation for the discontinuance of these services, nor, in fact, was authority for such discontinuance ever requested. (JA 719)

As noted, at p. 23, *supra*, the tail circuits which the IRCs were able to lease for short-term periods pursuant to their contracts with AT&T permitted them to offer private line circuits for similar brief periods (*e.g.*, to the press during a presidential trip abroad). AT&T's domestic tariffs, which do not offer short-term rates and require, at best, the IRCs' utilization of monthly rates, will make it uneconomical for the IRCs to offer the public short-term circuits at anything approximating current charges.

Through-group technologies are used to provide high-speed, broad-band communications services. Their loss may force the IRCs to cease offering these specialty communications.

¹ The tariffs also subordinate the IRCs' record services to AT&T's message telephone services (JA 302, 452), where both services are co-equals under the contracts. Thus, the IRCs will be forced to bear the brunt of services impairments in the event of facilities shortages and interruptions of circuits to the cable and INTELSAT earth stations.

The elimination of C2S conditioning of circuits will require the use of the higher and more expensive C5 conditioning. This conversion will cause the IRCs' customers' entire international circuit, and not merely the tail circuits, to be interrupted for reconditioning, thereby impairing service.

Communications Act section 214(a), 47 U.S.C. § 214(a) (1970), requires a carrier to obtain a certificate of public convenience from the Commission before it "discontinue, reduce, or impair service to a community." Thus, in *ITT World Communications Inc. v. New York Telephone Co.*, 381 F. Supp. 113 (S.D.N.Y. 1974), Judge Gurfein enjoined the New York Telephone Company from discontinuing certain services to the IRCs until the FCC had determined whether the telephone company was required to obtain a section 214 certificate. The court there stated:

The burden is cast upon the carrier which wishes to discontinue a service to make proper application for a certificate.

The Telephone Company has not applied for such a certificate. It has, instead, simply announced its intentions in a filed tariff which tells "other connecting carriers" what it is offering in the way of facilities.

* * *

If the Telephone Company is effecting an impairment of service, the mere filing of tariff does not make lawful what is otherwise unlawful. (*Id.* at 120, 121)

Judge Gurfein also noted that the term "community" as used in section 214 could apply to "an economic 'community' of users, such as international record carriers." Further,

[T]he important concept of 'community' in Section 214 I take to be the public interest. In the issue here raised, the inconvenience to the customers of the inter-

national record carriers is at least as great as to the carriers themselves." (*ITT v. New York Telephone Co.*, 381 F. Supp. at 121)

The Commission itself in *Bell System Tariff Offerings*, 46 F.C.C. 2d 413 (1974), refused to permit AT&T unilaterally to subject WU to AT&T's present tariffs for domestic OCCs without Section 214 approval because the termination of WU's contracts with AT&T for the provision of interconnection facilities might cause a service reduction. The FCC held:

[T]he regulatory scheme of the Act and the public interest requires that we review any actions taken in alleged violation of a contract or a tariff to insure compliance with Section 214. (*Id.* at 432)

The only service discontinuance to which the Commission addressed itself in its Order was the elimination of short-term circuits. (JA 719) Ignoring the qualitative significance of AT&T's ten-fold jump in minimum rates, the Commission brushed it off as a mere rate increase unaffected by section 214. (*Id.*) The IRCs' other impairments of services were ignored.

B. Unlawful Discrimination Between Entrance Facilities on East and West Coasts

Pursuant to their contracts with AT&T, the IRCs obtain entrance facilities on both coasts of the United States under uniform contract terms. Under the tariff structure proposed by AT&T to conform to the Commission's goal of "identity" between the IRCs and the domestic carriers, tail circuits from the IRCs' East Coast operating center to the principal transatlantic facilities are to be provided at the rates referenced in Tariff FCC No. 4 (JA 312) However, the very same facilities between the IRCs' West Coast operating centers and the principal transpacific cable and satellite stations would be saddled with the significantly

higher intrastate charges specified in Pacific Telephone and Telegraph Company Tariff FCC No. 126 (JA312). This arises from the fact that the IRCs' San Francisco gateway office, the Jamesburg earth station and the termini of the three Mainland-Hawaii cable systems, all are located within California.

This disparity within an international service, depending only upon the accident of geographic location, imposes upon the IRCs a *de facto* discrimination in violation of section 202(a) of the Communications Act. There also is a discrimination among the various competing IRCs because some have, proportionately, greater amounts of transpacific traffic than others. In *California v. FCC*, No. 75-2060, slip opinion (D.C. Cir. June 20, 1977), the Court of Appeals quoted with approval the FCC's determination that "[t]he key issue . . . is the nature of the communications which pass through the facilities, not the physical location of the lines." (Slip Opinion, p.5). See also, *American Trucking Ass'n v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

The Commission acknowledged (JA 711, 712) that this point had been raised by the IRCs, and with substantial factual support (JA 353-55, 396, 406-07, 449-56), but did not pass specific judgment on it. It simply treated the matter as somehow foreclosed by the Settlement Agreement negotiated by AT&T and the domestic carriers in Docket 20099. (JA 715, 200) However, the FCC is violating section 61.74 of its rules by permitting the incorporation by reference of non-jurisdictional California rates into an FCC tariff.

C. Tail Circuits Provided to Foreign Entities

AT&T supplies tail circuits from the cable and earth stations, not only to the IRCs, but also to foreign telecommunications entities for "transiting" traffic via the United States (*e.g.* from Europe to South America). The

various cable construction agreements require AT&T to furnish tail circuits to the IRCs and transiting foreign carriers on a non-discriminatory basis. (JA 188)

Thus, the Commissioner's Decision and Order should cause higher rates to be charged to the foreign carriers. (JA 708) This is apt to prompt reciprocal increases for "transiting" American traffic abroad and otherwise impair the sensitive relationships between U.S. international carriers, including AT&T, and the foreign "administrations." (JA 103, 123)

The FCC in its Decision of March 23, ignored this likely affect of its ruling. It failed to see, it said, how AT&T tariffs for domestic facilities could have any impact on the IRCs relationships with foreign entities. (JA 161) The IRCs again raised this issue in their Petitions for Reconsideration and Rejection, and again their concerns were summarily brushed aside. (JA 708) The FCC continued to insist that the foreign transiting issue was not before it in this case. To the contrary, the IRCs presented this issue repeatedly. (JA 103, 187-90, 275-280, 618) The FCC's rejection of the issues raised by the treatment of the foreign tail circuits is an unexplained departure from the past Commission precedent. *Transiting Traffic*, 23 FCC 2d 9 (1970); FCC Docket No. 18875 (JA 190; see also JA 278-79). This unexplained shift represents arbitrary, capricious, and reversible action by the commission. See, e.g., *Marine Space Enclosures, Inc. v. FMC*, 420 F.2d 577, 584-87 (D.C. Cir. 1969).

Conclusion

For the reasons stated, the Court should vacate and set aside the Commission's Decision and Order and the AT&T tariffs filed pursuant thereto.

Respectfully submitted,

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APPENDIX



Administrative Procedure Act
Section 706, 5 U.S.C. § 706.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

in making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934
Section 201, 47 U.S.C. § 201.

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to news-

Communications Act of 1934, Section 201,
47 U.S.C. § 201.

papers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Communications Act of 1934
Section 202, 47 U.S.C. § 202.

§ 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$500 for each such offense and \$25 for each and every day of the continuance of such offense.

Communications Act of 1934
Section 203, 47 U.S.C. § 203.

**§ 203. Schedules of charges; filing with Commission;
changes in schedules; overcharges and rebates;
penalty for violations**

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances

Communications Act of 1934, Section 203,
47 U.S.C. § 203.

or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense.

Communications Act of 1934
Section 205, 47 U.S.C. § 205.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum ~~or~~ minimum, or maximum and minimum, charge or charge to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Communications Act of 1934
Section 208, 47 U.S.C. § 208.

§ 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Communications Act of 1934
Section 211, 47 U.S.C. § 211.

§ 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Communications Act of 1934
Section 214, 47 U.S.C. § 214.

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communica-

Communications Act of 1934, Section 214,
47 U.S.C. § 214.

tion established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, re-

Communications Act of 1934, Section 214,
47 U.S.C. § 214.

duction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States \$100 for each day during which such refusal or neglect continues.

**Interstate Commerce Act
Section 2, 49 U.S.C. § 2.**

§ 2. Special rates and rebates prohibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Interstate Commerce Act
Section 3(1), 49 U.S.C. § 3(1).

§ 3. Preferences; interchange of traffic; terminal facilities

Undue preferences or prejudices prohibited

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Commission Rules
Section 1.311, 47 C.F.R. § 1.311.

§ 1.311 General.

Sections 1.311-1.325 provide for taking the deposition of any person (including a party), for interrogatories to parties, and for orders to parties relating to the production of documents and things and for entry upon real property. These procedures may be used for the discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both purposes.

(a) *Applicability.* For purposes of discovery, these procedures may be used in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing. For the preservation of evidence, they may be used in any case which has been designated for hearing and is conducted under the provisions of this subpart (see § 1.201).

(b) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The use of these procedures against the Commission is subject to the following additional limitations:

(1) The informer's privilege shall encompass information which may lead to the disclosure of an informer's identity.

(2) Commission personnel may not be questioned by deposition for the purposes of discovery except on special

*Commission Rules, Section 1.311,
47 C.F.R. § 1.311.*

order of the Commission, but may be questioned by written interrogatories under § 1.323. Interrogatories shall be served on the appropriate Bureau Chief (see § 1.21(b)). They will be answered and signed by those personnel with knowledge of the facts. The answers will be served by the Secretary of the Commission upon parties to the proceeding.

(3) Commission records are not subject to discovery under § 1.325. The inspection of Commission records is governed by the Freedom of Information Act, as amended, and by §§ 0.451-0.467 of this chapter. Commission employees may be questioned by written interrogatories regarding the existence, nature, description, custody, condition and location of Commission records, but may not be questioned concerning their contents unless the records are available (or are made available) for inspection under §§ 0.451-0.467. See § 0.451(b)(5) of this chapter.

(4) Subject to subparagraphs (1) through (3) of this paragraph, Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge.

(c) *Schedule for use of the procedures.* (1) Except as provided in this paragraph, discovery shall be initiated prior to the initial prehearing conference. See § 1.248. The presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the proper use of these procedures or the time to be allowed for such use.

*Commission Rules, Section 1.311,
47 C.F.R. § 1.311.*

(2) After the record has been closed, the parties may be permitted to take the testimony of witnesses, by deposition, for use in the event of further hearing proceedings, on motion, and solely to avoid a failure of justice.

(d) *Who shall act.* Actions provided for in §§ 1.311-1.325 will, in most cases, be taken by the officer designated to preside at the hearing (see § 1.241). If the proceeding, or a particular matter to which the action relates, is before the Commission, the Review Board, a commissioner or panel of commissioners, or the Chief Administrative Law Judge, the action will be taken by such officer or body. The term "presiding officer", as used in §§ 1.311-1.325 shall be understood to refer to the appropriate officer or body. See §§ 0.341, 3.351, 0.365, and 1.271 of this chapter.

(e) *Stipulations regarding the taking of depositions.* If all of the parties so stipulate in writing and if there is no interference to the conduct of the proceeding, depositions may be taken before any person, at any time (subject to the limitation below) or place, upon any notice and in any manner, and when so taken may be used like other depositions. An original and one copy of the stipulation shall be filed with the Secretary of the Commission, and a copy of the stipulation shall be served on the presiding officer, at least 3 days before the scheduled taking of the deposition.

Commission Rules
Section 1.313, 47 C.F.R. § 1.313.

§ 1.313 Protective orders.

The use of the procedures set forth in §§ 1.311-1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of providing for the proper conduct of the proceeding. The order may specify any measures, including the following to assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarrassment or oppression:

(a) That depositions shall not be taken or that interrogatories shall not be answered.

(b) That certain matters shall not be inquired into.

(c) That the scope of the examination or interrogatories shall be limited to certain matters.

(d) That depositions may be taken only at some designated time or place, or before an officer, other than that stated in the notice.

(e) That depositions may be taken only by written interrogatories or only upon oral examination.

(f) That, after being sealed, the deposition shall be opened only by order of the presiding officer.

Commission Rules
Section 1.315, 47 C.F.R. § 1.315.

§ 1.315 Depositions upon oral examination—notice and preliminary procedure.

(a) *Notice.* A party to a hearing proceeding desiring to take the deposition of any person upon oral examination shall give a minimum of 21 days notice in writing to every other party, to the person to be examined, and to the presiding officer. An original and three copies of the notice shall be filed with the Secretary of the Commission. Related pleadings shall be served and filed in the same manner. The notice shall contain the following information:

(1) The name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The time and place for taking the deposition of each person to be examined, and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(3) The matters upon which each person will be examined. See § 1.319.

(b) *Responsive pleadings.* (1) Within 7 days after service of the notice to take depositions, a motion opposing the taking of depositions may be filed by any party to the proceeding or by the person to be examined. See § 1.319(a).

(2) Within 14 days after service of the notice to take depositions, a response to the opposition motion may be filed by any party to the proceeding.

(3) Additional pleadings should not be filed and will not be considered.

*Commission Rules, Section 1.315,
47 C.F.R. § 1.315.*

(4) The computation of time provisions set forth in § 1.4(g) shall not apply to pleadings filed under the provisions of this paragraph.

(c) *Protective order.* On an opposition motion filed under paragraph (b) of this section, or on his own motion, the presiding officer may issue a protective order. See § 1.313. A protective order issued by the presiding officer on his own motion may be issued at any time prior to the date specified in the notice for the taking of depositions.

(d) *Authority to take depositions.* (1) If any opposition motion is not filed within 7 days after service of the notice to take depositions, and if the presiding officer does not on his own motion issue a protective order prior to the time specified in the notice for the taking of depositions, the depositions described in the notice may be taken. An order for the taking of depositions is not required.

(2) If an opposition motion is filed, the depositions described in the notice shall not be taken until the presiding officer has acted on that motion. If the presiding officer authorizes the taking of depositions, he may specify a time, place or officer for taking them different from that specified in the notice to take depositions.

(3) If the presiding officer issues a protective order, the depositions described in the notice may be taken (if at all) only in accordance with the provisions of that order.

Commission Rules
Section 1.316, 47 C.F.R. § 1.316.

§ 1.316 Depositions upon written interrogatories—notice and preliminary procedure.

(a) *Service of interrogatories; notice.* A party to the hearing proceeding desiring to take the deposition of any person upon written interrogatories shall serve the interrogatories upon every other party and shall give a minimum of 35 days notice in writing to every other party and to the person to be examined. An original and three copies of the interrogatories and the notice (and of all related pleadings) shall be filed with the Secretary of the Commission. A copy of the interrogatories and the notice (and of all related pleadings) shall be served on the presiding officer. The notice shall contain the following information:

(1) The name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The time and place for taking the deposition of each person to be examined, and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(3) The matters upon which each person will be examined. See § 1.319.

(b) *Additional interrogatories.* Within 7 days after the filing and service of the original interrogatories, any other party to the proceeding may, in the same manner, file and serve additional interrogatories to be asked of the same witness at the same time and place, with notice to the witness of any additional matters upon which he will be examined.

(c) *Cross interrogatories.* Within 14 days after the filing and service of the original interrogatories, any party

*Commission Rules, Section 1.316,
47 C.F.R. § 1.316.*

to the proceeding may, in the same manner, file and serve cross interrogatories, which shall be limited to matters raised in the original or in the additional interrogatories.

(d) *Responsive pleadings.* (1) Within 21 days after service of the original interrogatories, any party to the proceeding may move to limit or suppress any original, additional or cross interrogatory, and the person to be examined may file a motion opposing the taking of depositions. See § 1.319(a).

(2) Within 28 days after service of the original interrogatories, a response to a motion to limit or suppress any interrogatory or to a motion opposing the taking of depositions may be filed by any party to the proceeding.

(3) Additional pleadings should not be filed and will not be considered.

(e) *Protective order.* On a motion to limit or suppress or an opposition motion filed under paragraph (d) of this section, or on his own motion, the presiding officer may issue a protective order. See § 1.313. A protective order issued by the presiding officer on his own motion may be issued at any time prior to the date specified in the notice for the taking of depositions.

(f) *Authority to take depositions.* (1) If an opposition motion is not filed within 21 days after service of the notice to take depositions, and if the presiding officer does not on his own motion issue a protective order prior to the time specified in the notice for the taking of depositions, the depositions described in the notice may be taken. An order for the taking of depositions is not required.

(2) If an opposition motion is filed, the depositions described in the notice shall not be taken until the presiding officer has acted on that motion. If the presiding officer

*Commission Rules, Section 1.316,
47 C.F.R. § 1.316.*

authorizes the taking of depositions, he may specify a time, place or officer for taking them different from that specified in the notice to take depositions.

(3) If the presiding officer issues a protective order, the depositions described in the notice may be taken (if at all) only in accordance with the provisions of that order.

NOTE: The computation of time provisions of § 1.4(g) shall not apply to interrogatories and pleadings filed under the provisions of this section.

[33 F.R. 10571, July 25, 1968]

Commission Rules
Section 1.318, 47 C.F.R. § 1.318.

§ 1.318 The taking of depositions.

(a) *Persons before whom depositions may be taken.* Depositions shall be taken before any judge of any court of the United States; any U.S. Commissioner; any clerk of a district court; any chancellor, justice or judge of a supreme or superior court; the mayor or chief magistrate of a city; any judge of a county court, or court of common pleas of any of the United States; any notary public, not being of counsel or attorney to any party, nor interested in the event of the proceeding; or presiding officers, as provided in § 1.243.

(b) *Attendance of witnesses.* The attendance of witnesses at the taking of depositions may be compelled by the use of subpoena as provided in §§ 1.331-340.

(c) *Oath, transcript.* The officer before whom the deposition is to be taken shall administer an oath or affirmation to the witness and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed, unless the parties agree otherwise.

(d) *Examination.* (1) In the taking of depositions upon oral examination, the parties may proceed with examination and cross-examination of deponents as permitted at the hearing. In lieu of participating in the oral examination, parties served with the notice to take depositions may transmit written interrogatories to the officer designated in the notice, who shall propound them to the witness and record the answers verbatim.

(2) In the taking of depositions upon written interrogatories, the party who served the original interrogatories shall transmit copies of all interrogatories to the officer

*Commission Rules, Section 1.318,
47 C.F.R. § 1.318.*

designated in the notice, who shall propound them to the witness and record the answers verbatim.

(e) *Submission of deposition to witness; changes; signing.* When the testimony is fully transcribed, the deposition of each witness shall be submitted to him for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill, cannot be found, or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, the illness or absence of the witness, or of his refusal to sign, together with the reason (if any) given therefor; and the deposition may then be used as fully as though signed, unless upon a motion to suppress, the presiding officer holds that the reason given for the refusal to sign requires rejection of the deposition in whole or in part.

(f) *Certification of deposition and filing by officer; copies.* The officer shall certify on the deposition that the witness was duly sworn by him, that the deposition is a true record of the testimony given by the witness, and that said officer is not of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly send the original and two copies of the deposition and of all exhibits, together with the notice and any interrogatories received by him, by certified mail to the Secretary of the Commission.

Commission Rules
Section 1.319, 47 C.F.R. § 1.319.

§ 1.319 Objections to the taking of depositions.

(a) *Objections to be made by motion prior to the taking of depositions.* If there is objection to the substance of any interrogatory or to examination on any matter clearly covered by the notice to take depositions, the objection shall be made in a motion opposing the taking of depositions or in a motion to limit or suppress the interrogatory as provided in §§ 1.315(b) and 1.316(d) and shall not be made at the taking of the deposition.

(b) *Objections to be made at the taking of depositions.* Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition. If such objection is made, counsel shall, if possible, agree upon the measures required to obviate, remove, or cure such errors. The measures agreed upon shall be taken. If agreement cannot be reached, the objection shall be noted on the deposition by the officer taking it, and the testimony objected to shall be taken subject to the objection.

(c) *Additional objections which may be made at the taking of depositions.* Objection may be made at the taking of depositions on the ground of relevancy or privilege, if the notice to take depositions does not clearly indicate that the witness is to be examined on the matters to which the objection relates. See paragraph (a) of this section. Objection may also be made on the ground that the examination is being conducted in such manner as to unreasonably annoy, embarrass, or oppress a deponent or party.

*Commission Rules, Section 1.319,
47 C.F.R. § 1.319.*

(1) When there is objection to a line of questioning, as permitted by this paragraph, counsel shall, if possible, reach agreement among themselves regarding the proper limits of the examination.

(2) If counsel cannot agree on the proper limits of the examination the taking of depositions shall continue on matters not objected to and counsel shall, within 24 hours, either jointly or individually, telegraph statements of their positions to the presiding officer, together with the telephone numbers at which they and the officer taking the depositions can be reached, or shall otherwise jointly confer with the presiding officer. If individual statements are submitted, copies shall be provided to all counsel participating in the taking of depositions.

(3) The presiding officer shall promptly rule upon the question presented or take such other action as may be appropriate under § 1.313, and shall give notice of his ruling, by telephone, to counsel who submitted statements and to the officer taking the depositions. The presiding officer shall thereafter reduce his ruling to writing.

(4) The taking of depositions shall continue in accordance with the presiding officer's ruling. Such rulings are not subject to appeal.

Commission Rules
Section 1.321, 47 C.F.R. § 1.321.

§ 1.321 Use of depositions at the hearing.

(a) No inference concerning the admissibility of a deposition in evidence shall be drawn because of favorable action on the notice to take depositions.

(b) Except as provided in this paragraph and in § 1.319, objection may be made at the hearing to receive in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness, or the competency, relevancy or materiality of testimony are waived by failure to make them before or during the taking of depositions if (and only if) the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Objection on the ground of privilege is waived by failure to make it before or during the taking of depositions.

(c) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subparagraph (2) of paragraph (d) of this section. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) At the hearing (or in a pleading), any part or all of a deposition, so far as admissible, may be used against any

*Commission Rules, Section 1.321,
47 C.F.R. § 1.321.*

party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) To the extent that the affirmative direct case of a party is made in writing pursuant to § 1.248(d) the deposition of any witness, whether or not a party, may be used by any party for any purpose, provided the witness is made available for cross-examination. In all cases, the deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: ((i) That the witness is dead; or (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Commission Rules, Section 1.321,
47 C.F.R. § 1.321.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any hearing has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

Commission Rules
Section 1.323, 47 C.F.R. § 1.323.

§ 1.323 Interrogatories to parties.

(a) *Interrogatories.* Any party may serve upon any other party written interrogatories to be answered in writing by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories shall be served upon all parties to the proceeding. An original and three copies of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission. A copy of the interrogatories, answers and all related pleadings shall be served on the presiding officer.

(1) Except as otherwise provided in a protective order, the number of interrogatories or sets of interrogatories is not limited.

(2) Except as provided in such an order, interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered.

(b) *Answers and objections.* Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 14 days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions of a party (see § 1.321(d)).

*Commission Rules, Section 1.323,
47 C.F.R. § 1.323.*

(c) *Motion to compel an answer.* Any party to the proceeding may, within 7 days, move for an order with respect to any objection or other failure to answer an interrogatory. For purposes of this paragraph, an evasive or incomplete answer is a failure to answer; and if the motion is based on the assertion that the answer is evasive or incomplete, it shall contain a statement as to the scope and detail of an answer which would be considered responsive and complete. The party upon whom the interrogatories were served may file a response within 7 days after the motion is filed, to which he may append an answer or an amended answer. Additional pleadings should not be submitted and will not be considered.

(d) *Action by the presiding officer.* If the presiding officer determines that an objection is not justified, he shall order that the answer be served. If an interrogatory has not been answered, the presiding officer may rule that the right to object has been waived and may order that an answer be served. If an answer does not comply fully with the requirements of this section, the presiding officer may order that an amended answer be served, may specify the scope and detail of the matters to be covered by the amended answer, and may specify any appropriate procedural consequences (including adverse findings of fact and misall with prejudice) which will follow from the failure to make a full and responsive answer. If a full and responsive answer is not made, the presiding officer may issue an order invoking any of the procedural consequences specified in the order to compel an answer.

(e) *Appeal.* As order to compel an answer is not subject to appeal.

Commission Rules
Section 1.325, 47 C.F.R. § 1.325.

**§ 1.325 Discovery and production of documents and things
for inspection, copying, or photographing.**

(a) Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of § 1.313, the presiding officer may (1) order any party except the Commission (see paragraph (b) of this section) to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by § 1.311(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property of any designated object or operation thereon within the scope of the examination permitted by § 1.311(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

(b) Any party seeking the production of Commission records should proceed under § 0.460 or § 0.461 of this chapter. See §§ 0.451-0.467.

Commission Rules
Section 1.1201, 47 C.F.R. § 1.1201.

§ 1.1201 Definitions.

(a) *Restricted proceeding.* A proceeding in which the restrictions set forth in this subpart apply. See §§ 1.1203 and 1.1207.

(b) *Commission personnel.* All members, officers, and employees of the Commission.

(c) *Decision-making Commission personnel.* Those Commission personnel listed in §§ 1.1205 and 1.1209.

(d) *Non-decision-making Commission personnel.* All Commission personnel other than decision-making Commission personnel.

(e) *Interested person.* Any person having a direct or indirect interest in the outcome of a restricted proceeding, including the following:

(1) Parties to the restricted proceeding.

(2) Any other person who might be aggrieved or adversely affected by the outcome of the restricted proceeding. See sections 402(b)(6) and 405 of the Communications Act of 1934, as amended.

(3) Agents for persons who might be aggrieved or adversely affected by the outcome of the restricted proceeding, including attorneys and consulting engineers.

(f) *Presentation.* Any communication going to the merits or outcome of any aspect of a restricted proceeding.

NOTE: The term "presentation" is narrower than the general term "communication". For a discussion of the term "presentation", see 1 F.C.C. 2d (1965), at paragraphs 19-25.

*Commission Rules, Section 1.1201,
47 C.F.R. § 1.1201.*

(g) *Ex parte presentation.* (1) Any written presentation, made to decision-making personnel by any other person, which is not served on the parties to the proceeding. See §§ 1.47 and 1.211.

(2) Any oral presentation, made to decision-making Commission personnel by any other person, without advance notice to the parties to the proceeding and opportunity for them to be present.

Comission Rules
Section 1.1207, 47 C.F.R. § 1.1207.

§ 1.1207 Restricted rule making proceedings.

Except as otherwise ordered by the Commission, the following rule making proceedings are "restricted" from the day they are instituted until they have been decided by the Commission and are no longer subject to reconsideration by the Commission or review by any court:

(a) Any proceeding conducted pursuant to the provisions of sections 201(a), 204, 205, 213(a), 214(d), 221(c), or 222 of the Communications Act.

(b) Any proceeding involving the establishment of "charges, classifications, practices, regulations, and other terms and conditions", or the allocation of available facilities and stations among users, conducted pursuant to the provisions of section 201(c)(2) of the Communications Satellite Act of 1962.

(c) Any rate making proceeding conducted pursuant to the provisions of section 201(c)(5) of the Communications Satellite Act of 1962.

Commission Rules
Section 1.1209, 47 C.F.R. § 1.1209.

§ 1.1209 Decision-making Commission personnel (restricted rule making proceedings).

The following categories of persons are designated as decision-making Commission personnel in restricted rule making proceedings:

- (a) The Commissioners and their personal office staffs.
- (b) The Chief of the Office of Opinions and Review and his staff.
- (c) The Chief Administrative Law Judge, the Administrative Law Judges, and the staff of the Office of Administrative Law Judges.
- (d) The Chief of the Common Carrier Bureau and his staff; *Provided, however,* That in any restricted rulemaking proceeding where the Commission directs a separated trial staff to participate, the Chief, Hearing and Legal Division of the Common Carrier Bureau shall be a party in the proceeding and he and his staff shall be non-decision-making personnel. In such cases the Chief of the Hearing and Legal Division and his staff will be separated from the Commission [sic], the presiding Administrative Law Judge, the Office of the General Counsel, and the Chief and Deputy Chief and all division Chiefs of the Common Carrier Bureau, but are unrestricted in their access to all other Commission personnel.

NOTE.—Notwithstanding the requirements of § 1.1221 or any other provision of this chapter to the contrary, in restricted rulemaking proceedings, the Chief, Hearing and Legal Division and his staff shall be separated from decision making personnel only to the extent indicated in this paragraph.

- (e) The General Counsel and his staff.

*Commission Rules, Section 1.1209,
47 C.F.R. § 1.1209.*

- (f) The Chief Engineer and his staff.
- (g) The Chief of the Cable Television Bureau and his staff when participating in proceedings involving service by common carriers to cable television systems.
- (h) The Chief of the Office of Plans and Policy and his staff.

Commission Rules
Section 1.1221, 47 C.F.R. § 1.1221.

PROHIBITED PRESENTATIONS

§ 1.1221 Presentations prohibited in restricted proceedings which have been designated for hearing.

Except as provided in § 1.1227, the following presentations are prohibited in restricted proceedings which have been designated for hearing:

(a) *Oral presentations.* Persons outside the Commission and non-decision-making Commission personnel shall not, directly or indirectly, make or attempt to make any oral ex parte presentation.

(b) *Written presentations.* Interested persons and non-decision-making Commission personnel shall not, directly or indirectly, make or attempt to make any written ex parte presentation.

Commission Rules
Section 1.1223, 47 C.F.R. § 1.1223.

§ 1.1223 Presentations prohibited in restricted application proceedings prior to their designation for hearing.

As provided in § 1.1203(b), certain application proceedings are "restricted" following the submission of a petition to deny or public notice of the filing of a mutually exclusive application. Except as provided in § 1.1227, no interested person shall, directly or indirectly, make or attempt to make any oral or written ex parte presentation to decision-making Commission personnel concerning such a proceeding. Nor, in the absence of public notice, shall such an ex parte presentation be made, directly or indirectly, by an interested person having actual knowledge that a mutually exclusive application has been filed.

Commission Rules
Section 1.1225, 47 C.F.R. § 1.1225.

§ 1.1225 Solicitation of ex parte presentations.

(a) No person shall solicit or encourage others to make any presentation which he is himself prohibited from making under the provisions of this sub-part.

(b) Except as provided in § 1.1227, decision-making personnel shall not solicit or encourage ex parte presentations from any person, and shall not entertain ex parte presentations which are made to them.

Commission Rules
Section 1.1227, 47 C.F.R. § 1.1227.

§ 1.1227 Permissible ex parte communications.

The following communications shall not be considered to be ex parte presentations prohibited by the provisions of this subpart:

(a) Ex parte communications authorized by statute or by the Commission's rules. (See, for example, § 1.333(d).) However, pleadings which are required to be served but which may be ruled on ex parte do not fall within this category. (See, for example, §§ 1.296 and 1.298(a); such pleadings may not be submitted ex parte.)

(b) Such ex parte communications initiated by the staff of the Common Carrier Bureau or the Cable Television Bureau as may be necessary for the adduction of record evidence in restricted rule making proceedings.

(c) Any communication made by or to the General Counsel or his staff concerning judicial review of any matter which has been decided by the Commission.

(d) Any communication from an agency of the Federal Government involving classified security information.

(e) Any request for information solely with respect to the status of a restricted proceeding. (Interested persons, however, are prohibited from directly or indirectly soliciting ex parte status inquiries.)

(f) Any communication between decision-making and non-decision-making Commission personnel prior to the designation of a restricted proceeding for hearing.

Commission Rules
Section 1.1241, 47 C.F.R. § 1.1241.

PROCEDURES FOR HANDLING EX PARTE COMMUNICATIONS

§ 1.1241 Written ex parte communications.

(a) To the extent possible, written ex parte communications not authorized under § 1.1227 will be forwarded to the Executive Director rather than to the addressee.

(b) Unauthorized written ex parte communications which reach decision-making Commission personnel will be forwarded by them to the Executive Director. If the circumstances in which an unauthorized written ex parte presentation is made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Executive Director with the presentation.

(c) Unauthorized written ex parte communications, and all statements and correspondence pertaining thereto, will be placed in a public file, which will be associated with, but not made a part of, the file or record of the restricted proceeding to which the communication pertains. Prior to designation for hearing, no such communication, statement or correspondence shall be considered, without disclosure, in determining the merits of a restricted proceeding. After designation for hearing, no such materials shall be considered in determining the merits of a restricted proceeding unless they are made a part of the record of that proceeding.

(d) (1) If, in the judgment of the Executive Director, any unauthorized written ex parte presentation forwarded to him is prohibited by § 1.1221(b) or § 1.1223; or if in his judgment the presentation was solicited or encouraged in violation of § 1.1225; or if in his judgment the presentation should, for any other reason, be brought specifically to the attention of the parties, the Executive Director will serve copies of the presentation, together with copies of any

*Commission Rules, Section 1.1241,
47 C.F.R. § 1.1241.*

statement describing the circumstances in which it was made, upon the parties to the proceeding.

(2) If the written presentation is voluminous or the parties numerous, or if other circumstances satisfy the Executive Director that service of the presentation would be unduly burdensome, he may (in lieu of service) notify the parties to the proceeding that the presentation has been made and that it is available for public inspection.

(e) A copy of any statement describing the circumstances in which any unauthorized written ex parte presentation was submitted will be forwarded to the person who submitted the presentation. Within 10 days after the statement is mailed to him, the person who submitted the presentation may himself file with the Executive Director a notarized statement with regard to these circumstances, which the Executive Director (if he deems service appropriate) may serve upon parties to the proceeding.

Commission Rules
Section 1.1243, 47 C.F.R. § 1.1243.

§ 1.1243 Oral ex parte communications.

(a) If an unauthorized oral ex parte presentation is made to decision-making Commission personnel, they will advise the person making the presentation that it is prohibited and terminate the discussion of such matters.

(b) If an unauthorized ex parte presentation has in fact been made, the person to whom the presentation was made shall forward to the Executive Director a statement containing such of the following information as is known to him:

(1) The name of the restricted proceeding.

(2) The name and address of the person making the presentation and his relationship (if any) to the parties to the proceeding or their attorneys.

(3) The date and time of the presentation, its duration, and the circumstances (telephone, personal interview, casual meeting, etc.) under which it was made.

(4) A brief statement as to the substance of the matters discussed.

(5) Whether the person making the presentation persisted in doing so after having been advised that the presentation is prohibited.

(6) The date and time at which the statement was prepared.

(c) All statements submitted to the Executive Director pursuant to the provisions of this section, and all correspondence pertaining thereto, will be placed in a public file, which will be associated with, but not made part of, the file or record of the restricted proceeding to which the presentation pertains. Prior to designation for hearing,

*Commission Rules, Section 1.1243,
47 C.F.R. § 1.1243.*

no such presentation, statement or correspondence shall be considered, without disclosure, in determining the merits of a restricted proceeding. After designation for hearing, no such materials shall be considered in determining the merits of a restricted proceeding unless they are made a part of the record of that proceeding.

(d) All statements submitted to the Executive Director pursuant to the provisions of this section shall be served by the Executive Director on the parties to the proceeding. If the parties are numerous, or if other circumstances satisfy the Executive Director that service of the statement would be unduly burdensome, he may (in lieu of service) notify the parties to the proceeding that the presentation has been made and that a statement with respect to it is available for public inspection.

(e) The Executive Director will forward to the person who made the presentation a copy of the statement prepared by the person to whom the presentation was made. Within 10 days after that statement is mailed to him, the person who made the presentation may himself file with the Executive Director a notarized statement with respect to the substance of the presentation and the circumstances in which it was made, which the Executive Director (if he deems service appropriate) may serve upon parties to the proceeding.

Commission Rules
Section 1.1245, 47 C.F.R. § 1.1245.

§ 1.1245 Disclosure of information concerning ex parte presentations.

Any party to a restricted proceeding who has substantial reason to believe that an unauthorized ex parte presentation has been solicited, attempted or made, or who has information regarding such a presentation, shall promptly advise the Executive Director in writing of all the facts and circumstances concerning that presentation which are known to him.

Commission Rules
Section 1.1251, 47 C.F.R. § 1.1251.

SANCTIONS

§ 1.1251 Sanctions.

(a) *Parties.* Upon notice and hearing, any party to a restricted proceeding who directly or indirectly makes any unauthorized ex parte presentation, who encourages or solicits others to make any such presentation, or who fails to advise the Executive Director of the facts and circumstances concerning an unauthorized ex parte presentation (see § 1.1245), may be disqualified from further participation in that proceeding. Such alternative or additional sanctions as may be appropriate may be imposed.

(b) *Commission personnel.* Violations of the provisions of this subpart by Commission personnel will be disposed of in accordance with the procedures set forth in Administrative Order No. 10 and the penalties therein specified.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances will be imposed upon other persons who violate the provisions of this subpart.

Commission Rules
Section 61.38, 47 C.F.R. § 61.38.

§ 61.38 Material to be submitted with letters of transmittal by filing carriers.

(a) *Explanation and data supporting changes and/or new tariff offering.* The material to be submitted for a tariff change or for a tariff filing which is for a service not previously offered, shall include: (1) An explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter including:

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and

(ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided.

(b) *Working papers and statistical data.* (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change or tariff filing which is for a service not previously offered, two sets of working papers for use by the staff and two sets of working papers which shall be available for use by the public at the Com-

Commission Rules, Section 61.38,
47 C.F.R. § 61.38.

mission's offices. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.

(2) All statistical studies will be submitted and supported in the form prescribed in § 1.363 of this chapter.

(c) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, it will be the duty of the connecting carrier to provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) *Form and content of material submitted with certain rate increases.* (1) For each rate increase in any service or tariffed item resulting in (i) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (ii) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any 12-consecutive-month period resulting in (a) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (b) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of service, the filing carrier shall submit all cost, marketing and other data on which it relies in justification of the rate increase and in an appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing initially scheduled to commence on a date within 6 months from the date of filing. If the rate increase is designated for hearing the carrier shall

*Commission Rules, Section 61.38,
47 C.F.R. § 61.38.*

submit any additional information on which it relies in documentary form, within 45 days from the date of designation.

(2) The information and data requirement of subparagraph (1) of this paragraph shall be submitted for a rate increase in any service or tariffed item resulting in more than \$1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) *Copies of explanation and data to customer.* Concurrently with the filing of any rate for special construction or special assembly equipment and arrangements which was developed on the basis of estimated cost, the filing carrier shall transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) *Exception.* The requirements of this section shall not apply to any carrier with annual gross revenues of less than \$100,000.

Commission Rules
Section 61.74, 47 C.F.R. § 61.74.

§ 61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) A tariff containing certain matter applicable to a particular service may refer to another tariff for other matter applicable to such service if the reference is made in behalf of a carrier which is a party to each tariff: *Provided, however* That such reference does not result in undue complication.

(c) This section shall not prohibit a reference to a concurrence solely for the purpose of indicating where charges or regulations applicable to a service not governed by the tariff may be found.



(62270)

United States Court of Appeals
for the Second Circuit

Western Union International, Inc.,
RCA global Communications, Inc.,
and ITT World Communications, Inc.,
Petitioners,
against
Federal Communications commission,
United States of America and
American Telephone & Telegraph Company,
Respondents,
and another.

AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:
Bernard Frasier

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 274 W. 140th Street, New York, New York

That on November 22, 1977, he served 2 copies of
Brief

on and 1 Appendix on:
Roderick A. Mette,
1747 Pennsylvania, NW
Washington, D. C., 20006
Hon. Robert E. Bruce,
1919 M Street,
Washington, D.C., 20054.
Hon Griffin H. Bell,
U.S. Department of Justice,
Washington, D.C., 20053.

and by Hand on:
Cahill Gordon & Reindel,
80 Pine Street,
New York, New York, 10005.
LeBoeuf, Lamb, Leiby & MayRae,
140 Broadway,
New York, New York, 10005.
Alfred C. Partoll,
Gerald E. Murray, Edgar Mayfield and
James golden,
195 Broadway,
New York, New York, 10007.
Joseph Jacobs, 67 Broad St, NYC
Charles Lehraupt, 60 Broad Street, NYC

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
22 day of November, 1977.

Bernard Frasier
.....

John J. DeBenedictis
JOHN J. DEBENEDICTIS
Notary Public, State of New York
No. 80-0932350
Qualified in Nassau County
Commission Expires March 30, 1979